AN OUTLINE OF THE LAW RELATING TO CARRIAGE OF GOODS BY SEA

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BY

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TO
A J C.

PREFACE

THE object of this book is to present, for the use of students, a short survey of the law relating to Carriage of Goods by Sea which will serve as an introduction to the study of larger works on the subject I believe that, for a student fresh to the subject, the mass of detail in larger works tends to obscure the general outline of the law relating to charter parties and bills of lading Such an outline I have endeavoured to provide, and for a fuller treatment of the points discussed I must refer the reader to the larger works

For the groundwork of any knowledge of the subject I may possess, I am indebted to the lectures of Mr J G Pease, Reader to the Inns of Court I have also to thank Mr Richard O'Sullivan, of the Middle Temple, for valuable assistance in elucidating a number of points and in reading the proofs

W P

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CARRIAGE BY SEA.

CHAPTER I

THE CONTRACT OF AFFREIGHTMENT

THERE are two ways in which a ship may be employed, and they give rise to contracts which differ considerably in their effects

(1) The entire carrying capacity of the ship may be engaged by one merchant for a particular voyage, or for a period of time, for purposes agreed on between the shipowner and the merchant In this case the contract is called a charter party and the merchant is termed the charterer

Charter party

(2) The ship may be advertised for a specified voyage to carry for any persons who wish to send goods to the places mentioned In this case the ship is said to be employed as a general ship, and the contract is embodied in a bill of lading

Bill of lading

This division is not absolute, for even when the agreement is to carry goods which form only part of the ship's cargo it may be embodied in a charter party And when the charterer of a ship himself supplies the cargo, he usually obtains bills of lading signed by the master of the ship as evidence that the goods have been shipped Whether the contract is embodied in a charter party or is evidenced by a bill of lading, the consideration paid to the shipowner for the use of the ship is called freight

Where the charterer himself supplies the cargo, the bill of lading is generally merely a receipt for the goods shipped The rights of shipowner and charterer will be governed by

the charter party The bill of lading cannot vary or add to the terms of the charter party unless it contains an express provision to that effect (*a*) But the charterer may hire the vessel for the purpose of putting her up as a general ship In this case the contract of carriage will be embodied in the bill of lading given to each shipper when the goods are put on board The rights of such shippers will not be subject to the terms of the charter party unless there is a clear stipulation in the bill of lading to that effect (*b*) And where the charterer subsequently has indorsed to him a bill of lading issued to a person who has shipped goods on board the chartered ship, he will be bound by its terms so far as the goods referred to in the bill of lading are concerned (*c*)

A charter party may operate in two ways

Charter party proper

(A) It may confer on the charterer simply the right to have his goods carried by a particular vessel Here the possession and control of the ship are not transferred to the charterer The shipowner exercises these rights through the master and crew who are employed by him

Charter of demise

(B) It may amount to a demise or lease of the vessel In this case the charterer puts his own stores, coal, &c, on board and hires the crew The master and crew are the charterer's servants, and the possession and control of the ship vest in him Consequently the shipowner has no responsibility in connexion with goods shipped while the vessel is thus leased Nowadays the courts do not readily construe a charter party as a demise, and agree ments which fall under class (A) are far more usual

The importance of the distinction between a charter of

(*a*) *Rodocanachi* v *Milburn* (1886), 18 Q B D 67
(*b*) *Pearson* v *Goschen* (1864), 33 L J C P 265.
(*c*) *Steamship Calcutta Co.* v. *Weir* (1910), 1 K B 759.

demise and a charter party proper lies mainly in the fact that under the former the master is the agent of the charterer, not of the shipowner In *Sandeman* v *Scurr* (*d*) a ship was chartered to proceed to Oporto and there load a cargo The charter party gave the master power to sign bills of lading at any rate of freight without prejudice to the charter Goods were shipped at Oporto by persons ignorant of the charter party, under bills of lading signed by the master *Held*, the charter did not amount to a demise Consequently the master's signature to the bill of lading bound the shipowner and he was liable to the shipper for damage arising from bad stowage of the goods

On the other hand, in *Baumvoll* v *Gilchrest* (*e*) the charter provided for the hire of the ship for four months, the charterer to find the ship's stores and pay the captain and crew Insurance and maintenance of the vessel were to be paid by the shipowner, who reserved power to appoint the chief engineer In these circumstances it was held that the charter amounted to a demise because the possession and control of the vessel had been handed over to the charterer Hence the shipowner was not liable to shippers ignorant of the charter for the loss of goods shipped under bills of lading signed by the master

Customs of trade

Construction of the Contract —The primary consideration in construing any contract is the intention of the parties But where the contract has been reduced to writing, the rule is that evidence cannot be given for the purpose of incorporating matter extraneous to the written contract. To this rule customs of trade form an exception There is a presumption that the parties to a mercantile contract

(*d*) (1866), 36 L J Q B 58 (*e*) (1893), A C 8.

entered into it with reference to the customs prevailing in the particular trade or locality to which the contract relates This presumption can be rebutted only by showing that the parties intended to exclude the custom, and the most effective way of doing this is by showing that the express terms of the contract are inconsistent with the usage which it is sought to incorporate

The terms of a contract may be explained or added to by evidence of any usage consistent with the contract But, while the usage may regulate the mode of performance, it must not be such as to change the intrinsic character of the contract (*f*) In the case of a bill of lading, evidence of usage will be more readily admitted than in the case of a charter party, for, whereas the charter party is the contract, the bill of lading is merely a memorandum of the contract

In *Aktieselkab Helios* v *Ekman* (*g*) a ship was chartered to deliver in London a cargo of timber " to be taken from alongside at merchant's risk and expense " A custom of the Port of London, whereby the obligation lay on the shipowner to put the timber into lighters brought alongside by the consignees, was held to be not inconsistent with the charter and therefore binding

In *The Alhambra* (*h*) the charter contained a provision that the ship should discharge at a " safe port or as near thereto as she can safely get and always lay and discharge afloat " Evidence of a custom for vessels to lighten outside and complete the unloading inside the port was rejected because the obligation on the charterer was to name a port which the ship could enter when fully loaded

(*f*) *Robinson* v *Mollett* (1875), 44 L J C P 362
(*g*) (1897), 2 Q B 83
(*h*) (1881), 50 L J Adm 36

In *British and Mexican Co* v *Lockett* (*i*) evidence of a custom was received for the purpose of explaining the term "working day" in the demurrage clause of a charter party It appeared that by the custom of the port a "surf day"—one on which lighters could not discharge owing to surf on the beach—was not counted as a working day

Conflict of laws

Where the parties to a charter or bill of lading are of different nationalities questions sometimes arise as to what law is to be applied in construing the contract The broad rule of English law is that the place at which a contract is made determines the law which is to be applied But this is only a general presumption as to the intention of the parties and may be rebutted by evidence of a contrary intention Indeed, it is displaced by the mere fact that the whole performance of the contract is to take place elsewhere, for this is taken as an implied indication of the intention of the parties (*j*)

The *lex loci contractus*

In the case of contracts of carriage by sea, however, there are special reasons why the *lex loci contractus* should not be applied In the first place, by international law a ship is regarded as a floating island and therefore subject to the jurisdiction of the courts of the country whose flag she flies Secondly, bills of lading are usually given at the port of loading, but charter parties are very often made elsewhere Suppose a French ship is chartered in London to proceed to Alexandria and is there put up by the charterer as a general ship If the *lex loci contractus* is applied the charter party will be governed by English law, the contracts embodied in the bills of lading by Egyptian

(*i*) (1911), 1 K B 264

(*j*) Per Lord Esher in *Chatenay* v *Brazilian, &c., Co* (1891), 1 Q B at p 83.

law, and the ship will be under the jurisdiction of the French courts as to anything happening on the high seas To avoid such an inconvenient state of affairs, it has been laid down that contracts of carriage by sea are to be governed by the law of the ship's flag (*k*)

The law of the flag

The leading case on this subject is *Lloyd* v *Guibert* (*k*) In that case a French ship was chartered by a British subject in the Danish West Indies for a voyage from Hayti to Liverpool She put into a Portuguese port for repairs, and the master was obliged to borrow money on a bottomry bond to pay for the repairs As the value of the ship and freight proved insufficient to repay the loan, the cargo had to contribute The plaintiff, as owner of the cargo, claimed an indemnity from the shipowner To this he was entitled by Danish, Portuguese, and English law, but not by French law It was held that the master's authority was limited by the law of the ship's flag, and consequently the cargo owner was not entitled to an indemnity

The principle established in *Lloyd* v *Guibert* is not confined to the particular facts of that case It is applicable not merely to questions of construction, but to the rights and obligations under the contract and the validity of stipulations in the contract itself (*l*)

Evidence

As to evidence, the general rule is that the *lex fori*—the law of the place where the action is brought—applies In *Denholm* v *Halmoe* (*m*) a statement as to the quantity of cargo shipped was held to be not conclusive against the shipowner because the action was brought in Scotland Such a statement would have been conclusive by the law

(*k*) *Lloyd* v *Guibert* (1865), 33 L J Q B 241

(*l*) Per Chitty, J *In re Missouri S S Co* (1889), 42 Ch D at p 327.

(*m*) (1887), 25 Sc L R 112.

of the flag (Danish) and by that of the place where the goods were shipped (Russia)

Moreover, the rule that the law of the flag governs contracts of carriage by sea is subject to the paramount rule of the intention of the parties, which may be express or implied from the circumstances of the case Thus in *The Industrie* (*n*), although the ship was German, she was chartered by an English broker in London to English merchants *Held*, the law of England applied

Through carriage

There appears to be some doubt as to the law governing a contract for through carriage partly by land and partly by sea Probably the best view is that as regards the land journey the law of the country applies, while the law of the flag governs the sea transit

(*n*) (1894), 63 L J P 84.

CHAPTER II

BILLS OF LADING

Formation of the contract

In the case of a contract for the conveyance of goods in a general ship, the course of events is usually as follows The date of sailing and other particulars relating to the size of the ship and the course of the voyage are advertised or otherwise made public A person who wishes to send goods communicates with the master of the ship or the shipowner's agents, agrees upon the rate of freight, and promises to send a certain quantity of goods These are delivered at the quay, or in lighters alongside the ship, and given into the custody of the person in charge of the ship who gives an acknowledgment called the mate's receipt The shipper fills up the bill of lading, stating the quantity of goods sent for shipment and the marks by which the packages are identified These are checked by the master of the ship when the goods are put on board, and he signs the bill of lading and returns it to the shipper in exchange for the mate's receipt

Several bills of lading

In practice bills of lading are usually made out in three or more parts The master keeps one for reference, the shipper takes the others A bill of lading is a document of title to the goods mentioned in it, and the shipper must transmit a bill of lading to the consignee in order to enable him to obtain delivery of the goods The practice of making out several bills of lading for the same goods involves the risk of different people claiming the goods If he has no notice that other bills of lading for the same

goods have been assigned, the master must deliver to the first person presenting a proper bill of lading (*a*)

Printed bills of lading Shipper bound by terms

Regular lines of ships use printed bills of lading, the shipper having merely to fill in particulars of the goods shipped Ordinarily the terms of such printed bills are well known to shippers, but exceptional terms are sometimes introduced, and the question, familiar in the law of contract, arises How far is an acceptor of an offer in common form bound by conditions contained in it? The question has arisen mainly in connexion with tickets issued to passengers containing stipulations limiting the liability of the carrying company The answer is that the acceptor is bound by such terms, whether he read them or not (*b*) provided reasonable notice of them was given him (*c*) In *Crooks* v *Allan* (*d*) Lush, J , said "If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document that a person of ordinary capacity and care could not fail to see it"

Functions of a bill of lading

"A bill of lading is a receipt for goods shipped, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship It is not the contract, for that has been made before the bill of lading was signed, but it is excellent evidence of the terms of the contract" (*e*)

(*a*) *Glyn* v *E and W India Dock Co* (1882), 7 A C 591
(*b*) *Watkins* v *Rymill* (1883), 10 Q B D 178
(*c*) *Richardson* v *Rowntree* (1894), A C 217
(*d*) (1879), 5 Q B D at p 40
(*e*) "Scrutton on Charter Parties," 7th ed p 7, based on Lord Bramwell's judgment in *Sewell* v *Burdick* (1884), 10 A. C at p 105,

This description of a bill of lading brings out very clearly two of the three functions which a bill of lading fulfils

Receipt

(1) It serves as a receipt for goods shipped, and contains certain admissions as to their quantity and condition when put on board

Memorandum

(2) It embodies the terms of the contract of carriage

Document of title

(3) It is a document of title without which delivery of the goods cannot be obtained

It is in the first and third of these functions that a bill of lading differs from a charter party The contract of carriage may be embodied in a charter party or in a bill of lading or it may be contained in both taken together But a charter party is always a contract and nothing more, whereas a bill of lading, whether it is a memorandum of the contract or merely a receipt for goods shipped, is always a document of title by means of which the property in the goods may be transferred

The Bill of Lading as a Document of Title

Bill of lading equivalent to possession of the goods

For many purposes possession of a bill of lading is equivalent in law to possession of the goods It enables the holder to obtain delivery of the goods at the port of destination, and, during the transit, it enables him to sell the goods by merely transferring the bill of lading

Goods are sometimes sold under a c i f contract, which means that the seller is to receive a sum of money equal to the value of the goods, the insurance on them and the freight for carrying them Payment is usually made in exchange for the shipping documents, *i e* the bill of lading, policy of insurance and invoice of the goods In *Horst* v *Biddell Bros* (*f*), a contract was made for the sale of hops to be shipped from San Francisco to London, c i f net

(*f*) (1912), A C. 18.

cash The buyer refused to pay for the goods until they were actually delivered It was held that possession of the bill of lading is in law equivalent to possession of the goods, and that, under a c i f contract, the seller is entitled to payment on shipping the goods and tendering to the buyer the documents of title In a similar case (*g*) the buyer refused to pay because only two out of the three bills of lading were tendered to him *Held*, apart from a special stipulation, the tender of one bill of lading is sufficient

Its transfer may pass property in the goods

By the custom of merchants, a bill of lading making goods deliverable to order or assigns may be endorsed and delivered so as to pass the property in the goods (*h*) Mere delivery of the bill of lading may pass the property in the goods provided the goods are deliverable

(1) To bearer, or

(2) To a person whose name is not filled in, or

(3) To a person named who has endorsed the bill in blank

An endorsement in blank is simply a signature written across the back of a bill It is distinguished from an endorsement in full, which contains a direction to pay or deliver to a particular person If an endorsement in full contains the words "or order," the endorsee can, by endorsing it in blank, make the bill assignable by mere delivery as in case (3) above

The common law gave effect to the mercantile usage whereby endorsement and delivery of a bill of lading during the transit gave to the endorsee such property in the goods as it was the intention of the parties to transfer In order that the property in the goods may pass by

(*g*) *Sanders* v *McClean* (1883), 52 L J Q B 481
(*h*) *Lickbarrow* v *Mason* (1794), 5 T R, 683,

assignment of the bill of lading, the following conditions must be complied with

Conditions of property passing

(i) The bill of lading must be negotiable on the face of it

(ii) The goods must be in transit They need not be at sea, but they must have been handed over to the shipowner for carriage and not yet delivered to any person having a right to claim them under a bill of lading

(iii) The bill of lading must have been put in circulation by one who has title to the goods Herein bills of lading differ from negotiable instruments proper, for a *bona fide* holder for value of the latter gets a good title irrespective of prior equities

(iv) There must have been an intention to transfer the property Thus, an assignment of a bill of lading to an agent to enable him to obtain delivery on behalf of his principal will not pass any property to the agent

The endorsement and delivery of a bill of lading passes only such property in the goods as the parties intended to pass Hence it may

(1) Pass no property at all

(2) Pass the property subject to a condition

(3) Pass the property absolutely

(4) Merely effect a mortgage or pledge of the goods as security for money lent

Rights of unpaid vendor *Jus disponendi*

As to the first of these cases, it is common for an unpaid vendor to reserve the right of disposing of the goods by taking the bills of lading in his own or his agent's name as consignee The bill is sent to the agent in order to prevent the vendee obtaining delivery of the goods before payment of the price Clearly no property in the goods is intended to pass to the agent in such a case.

Conditional endorsement

The unpaid vendor may also ensure payment by a conditional endorsement of the bill of lading This is effected by forwarding to the vendee one of the bills of lading together with a bill of exchange for the price of the goods It was decided in *Shepherd* v *Harrison* (*i*), that unless the vendee accepts the bill of exchange in such a case, he has no right to retain the bill of lading It should be observed, however, that the vendee in this case is a person in possession of a document of title to goods with the consent of the seller Consequently, if he transfers it to a *bona fide* purchaser for value, the latter gets a valid title to the goods under the Factors Act, 1889, even though the vendee has not accepted the bill of exchange (*j*)

Stoppage *in transitu*

Besides the right of conditional endorsement and of reserving the *jus disponendi*, the unpaid seller can resume possession of the goods by exercising the right of stoppage in transit This is defined by the Sale of Goods Act, 1893, section 44, as follows

Definition

"Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price"

There are four points to be noted in connexion with this right, but only two of them require detailed discussion The points are

(1) The buyer must be insolvent He need not be bankrupt It is sufficient if he cannot pay his debts as they fall due

(*i*) (1871), 40 L J Q B 148,
(*j*) *Cahn* v *Pockett's, &c., S P Co* (1899), 1 Q B. 643

(2) The right can be exercised only while the goods are in transit

(3) Its exercise does not rescind the contract of sale but merely restores possession of the goods to the seller

(4) It is defeated by a transfer of the bill of lading for value If the transfer merely creates a charge on the goods, the right of stoppage is postponed to such charge

The transit

The question of the duration of the transit is primarily one of the intention of the parties Ordinarily the transit begins when the goods leave the seller's possession, and ends when they get into the possession of the buyer Delivery to the buyer's agents for the purpose of forwarding puts an end to the transit if the further destination has not been notified to the seller otherwise it does not (*k*)

Delivery to carriers

Delivery to carriers does not end the transit even though they are employed by the buyer Thus, if the buyer charters a ship and sends for the goods, the transit is not terminated by shipment of the goods, although the seller does not know where the goods are being taken (*l*) But, where the charter amounts to a demise so that the buyer has complete control of the ship, an unconditional delivery to the master puts an end to the transit (*m*) And where the buyer actually owns the vessel, the presumption is even stronger that an unconditional delivery, waiving the right of stoppage, is intended

Constructive possession.

Where the carrier agrees to hold the goods for the

(*k*) *Ex parte Miles* (1885), 15 Q B D 39

(*l*) *Ex parte Rosevear China Clay Co* (1879), 11 Ch D 560

(*m*) *Fowler* v *Kymer*, cited in 3 East at p 396 The delivery in this case was not for conveyance to the bankrupt, but for an independent adventure on which the goods were sent by him

consignee, *e g* to warehouse them for him, the transit is determined (*n*) But it must be clear that the carrier intended to hold the goods for the consignee Thus in *Coventry* v *Gladstone* (*o*), the holders of bills of lading for linseed obtained from the shipowner's agents an order for delivery The captain said he would deliver to them as soon as the cargo stowed on top of the linseed had been discharged *Held*, that a notice to stop the goods after this was valid

Defeated by endorsement of bill of lading

Generally the right of stoppage in transit exists against the vendee and all who claim under him It is available against a purchaser from the vendee But where such a purchaser takes a bill of lading or other document of title *bona fide* and for value, the right of stoppage in transit is lost The endorsee of a bill of lading is thus in a better position than the original consignee, for the latter's title to the goods is subject to the vendor's right of stoppage in transit

In *Lickbarrow* v *Mason* (*p*), T shipped goods under a bill of lading (in four parts) made out to T or order or assigns Two of the bills of lading were endorsed in blank and sent to Freeman the buyer of the goods Freeman sold the goods and transferred the two bills of lading to Lickbarrow, a *bona fide* purchaser for value Freeman became bankrupt T tried to stop the goods in transit, and sent one bill of lading to Mason, who obtained possession of the goods It was held that T's right to stop the goods had been defeated by the assignment to Lickbarrow, who was therefore entitled to recover the goods

Priority of holders of bills of lading

The case of *Lickbarrow* v *Mason* was re tried (*q*) and

(*n*) *Foster* v *Frampton* (1826), 2 C & P 469
(*o*) (1868), 37 L J Ch 492 (*p*) (1787), 2 T R 63
(*q*) (1794), 5 T R 683 The original decision stands

the special verdict then found stated that, by the custom of merchants, the property in goods shipped is passed by a transfer of the bill of lading after such goods have been shipped and before the voyage is performed It is clear, then, that while the goods are at sea, a transfer of the bill of lading may pass the property in them

The case of *Barber* v *Meyerstein* (*r*), raised the question of the effect of the transfer of a bill of lading after the goods had been landed subject to a stop for freight When the goods were in this position, the consignee pledged two of the bills of lading to M He then obtained a further advance from B by depositing the third bill of lading with him B obtained possession of the goods and was sued for the amount of the advance made by M It was held that, although the goods had been landed and warehoused, the freight being then unpaid, the bills of lading were in force at the time of their deposit with M just as if the goods had been at sea M being the first pledgee for value, the transfer of the bill of lading to him vested in him the property in the goods and all subsequent dealings with the other part of the bills of lading were subordinate to the first Hence M was entitled to recover from B the amount of his advance The following dictum of Mr Justice Willes was quoted (*s*) with approval, " The bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it "

Assignment of the Contract in the Bill of Lading

Bills of Lading Act, 1855, section 1

At common law contracts were not assignable Hence a transfer of the bill of lading with intention to pass the property in the goods did not transfer the rights

(*r*) (1870), 39 L J C P 187 (*s*) *Ibid* at p 191.

and liabilities under the contract of carriage, it merely passed the property in the goods The Bills of Lading Act, 1855, provides that a transfer of the bill of lading to a person to whom the property in the goods thereby passes shall carry with it the rights and liabilities under the contract in the bill of lading Section 1 of the Act is as follows

"Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself"

There are three points to be noted in connexion with this section

(1) The contract transferred is that set out in the bill of lading

(2) If an endorsee sells the goods and re endorses the bill of lading, his liability under the contract ceases

(3) The transfer of a limited or special property in the goods does not operate as an assignment of the contract

Assignee bound by terms in bill of lading only

The contract transferred is that embodied in the bill of lading including, of course, such terms as are implied by law in all contracts of carriage by sea, *e g* not to deviate If the bill of lading does not contain some term of the original agreement, that term will not be binding as between shipowner and assignee of the bill of lading Thus in *Leduc* v *Ward* (*t*), the ship deviated to Glasgow and was lost The endorsee of the bill of lading sued for non delivery of the goods It was held that evidence to show that,

(*t*) (1888), 57 L J Q B 379

before the goods were put on board, the shippers had agreed to the deviation to Glasgow was not, as between the ship owner and the endorsee of the bill of lading, admissible to vary the contract contained therein And in *Ohrloff* v *Briscal* (*u*) it was held that the endorsee of the bill of lading is not estopped from complaining of bad stowage even if the shipper himself had acted so as to be estopped Shipper and assignee do not stand to each other in the relation of agent and principal but of vendor and purchaser

Assignee not bound after re endorsement

If the endorsee of a bill of lading sells the goods and re endorses the bill of lading, he ceases to be responsible for liabilities under the contract, but if he retains the bill of lading a mere re sale will not free him (*v*) And re endorsement must take place while the goods are in transit and before delivery It is only during that time that a transfer of the bill of lading can pass the property in the goods After delivery, the bill of lading is no longer valid as a document of title

Pledgee not liable on contract in bill of lading

The question what property in the goods must pass in order to transfer the contract in the bill of lading was considered in *Sewell* v *Burdick* (*w*) In that case machinery was consigned to Poti deliverable to shipper or assigns on payment of freight The skipper pledged the bills of lading with bankers as security for a loan The shipper having failed to claim the goods, they were sold by the Russian customs authorities but did not realize more than the amount of the customs duty and charges The shipowner sought to recover the freight from the bankers as holders of the bills of lading *Held*, the mere endorsement and

(*u*) (1866), 14 L T at p 875
(*v*) *Fowler* v *Knoop* (1878), 48 L J Q B 333
(*w*) (1884), 10 A C 74

delivery of a bill of lading by way of pledge does not pass the property in the goods to the endorsee so as to make the latter liable on the contract in the bill of lading

Lord Selborne's judgment in this case makes it clear that the question is one of the intention of the parties "One test is whether the shipper retains any such proprietary right in the goods as to make it just that he should also retain rights of suit against the shipowner under the contract in the bill of lading If he does, the statute can hardly be intended to take those rights from him and transfer them to the endorsee If they are not transferred, neither are the liabilities" (*x*)

But the Act is not restricted to cases of out and out sale It would probably apply to an endorsee of a bill of lading by way of security "who converts his symbolical into real possession by obtaining delivery of the goods" (*y*)

Bills of Lading Act, 1855 section 2

Section 2 of the Act preserves the original shipper's liability for freight, but apparently he gets rid of all other liabilities under the contract of carriage once he sells the goods and transfers the bill of lading to the consignee or an endorsee to whom the property in the goods passes The only right which the Act reserves to the shipper is the right of stoppage in transit

(*x*) (1884), 10 A C at p 84 (*y*) *Ibid* p 86

CHAPTER III

LIABILITY OF CARRIER

At common law

At common law a public carrier of goods is subject to very stringent liability for their safe delivery He is responsible to the owner of the goods for any loss or damage to them unless caused by

(1) an act of God ,
(2) an act of the King's enemies ,
(3) inherent defects in the goods themselves ,
(4) the negligence of the person sending the goods

The severity of this rule of the common law is said to have had its origin in the danger of theft by the carrier's servants or collusion between them and thieves To prevent this, the responsibility of an insurer of the safe delivery of the goods was imposed on the carrier in addition to his liability as bailee for reward (*a*)

Is shipowner a common carrier ?

Strictly a common carrier is one who holds himself out as ready to carry the goods of anyone who chooses to employ him, and is liable to an action for refusing to do so There is some conflict of opinion as to whether a shipowner is a common carrier or not Story on Bail ments (*b*), says that a shipowner is deemed to be a com mon carrier only in respect of such ships as are employed as general ships This view is adopted by Mr Justice

(*a*) *Riley* v *Horne* (1828), 5 Bing 217 , *Coggs* v. *Bernard* (1703), 2 Lord Ray at p 918
(*b*) Section 501,

Scrutton in his work on Charter-parties and Bills of Lading (*c*)

As the liability of the shipowner at common law is the basis of the law of carriage by sea, the following cases should be carefully studied

In *Morse* v *Slue* (*d*) goods were shipped for Cadiz in a vessel lying in the Thames Before she sailed, the goods were forcibly taken by robbers The master was held liable for the loss although he had not been negligent With reference to this case, Cockburn, C J , in *Nugent* v *Smith* remarked, " There seems no reasonable doubt that the ship was a general ship " (*e*)

In *Liver Alkali Co* v *Johnson* (*f*) the defendant hired out lighters Each voyage was made under a separate contract and a lighter was not let to more than one person for the same voyage The ship was, therefore, not a general ship The Exchequer Chamber held that the defendant was subject to the same liability as a common carrier, and considered it unnecessary to decide whether in fact he was a common carrier or not Brett, J , held the defendant was not a common carrier, but was nevertheless under the same liability He said, " Every shipowner who carries goods for hire in his ship, whether by inland navigation, coastways or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement he limits his liability by further exceptions "

In *Nugent* v *Smith* (*g*) Cockburn, C J , strongly dissented from this view so far as it applies to ships not employed as general ships He maintained that a shipowner who is

(*c*) 6th edition, p 186
(*d*) (1671), 2 Keb 866
(*e*) (1876), 45 L J Q B at p 703
(*f*) (1874), L R 9 Ex 338
(*g*) (*Supra*), p 700 *et seq*

not a common carrier is only liable as a bailee for the exercise of due care and diligence On this view, the decision in *Lever Alkali Co* v *Johnson* may be supported on the ground that the contract was merely to carry so much goods and not one for the hire or charter of a specific ship

When goods are shipped, a special contract is almost always made, and this may vary the liability of the carrier to any extent The bill of lading usually contains a list of excepted perils including the common law exceptions, act of God and the King's enemies together with many others For the form of a bill of lading containing the usual exceptions, *see* Appendix A

Effect of the excepted perils

The shipowner undertakes in the bill of lading to deliver the goods in the same good order and condition as they were when shipped Consequently he is liable for all loss or damage to the goods while they are on board, unless it was caused by excepted perils But excepted perils only operate to excuse for non delivery of the goods or for loss of, or damage to them during the agreed voyage Hence they do not affect

(1) The shipowner's duty to take care If the goods are damaged, even by an excepted peril, he must do his best to protect them from further injury

(2) Loss or damage caused by unseaworthiness of the vessel at starting (*h*)

(3) Loss or damage in case of deviation By deviating the shipowner has substituted another voyage for the agreed one and is only entitled to the benefit of the common law exceptions (*h*)

(4) Freight The shipowner is generally entitled to freight only when the goods are delivered If an excepted peril prevents delivery, no freight is payable (*i*).

(*h*) *See* chap v

(*i*) *See* chap ix.

Express contract, implied exceptions

From the judgment of Willes, J , in *Lloyd* v *Guibert* (*j*), it appears that if there is an express contract which does not stipulate for the implied exceptions act of God and the King's enemies, the shipowner will not be entitled to the benefit of them But he will not be liable for damage arising from inherent defects in the goods or from negligence of the shipper And apart from a special contract which excludes statutory exemptions, they will be implied (*k*).

Construction of the exceptions

The exceptions in a bill of lading are for the benefit of the shipowner, and are therefore construed against him Hence he cannot protect himself by ambiguous and general words (*l*) In *Ingram* v *Services Maritimes du Tréport* (*m*), a stipulation was inserted in the bill of lading, absolving the shipowners from every duty, warranty, or obligation, provided they exercised reasonable care in connexion with the upkeep of the ship It was held that this was too ambiguous to exempt the shipowner from the obligation to provide a seaworthy ship

Effect of negligence

Where loss arises from a cause excepted in the bill of lading, the shipowner will not be protected if that cause operated owing to his neglect In *Searle* v *Lund* (*n*) owing to the negligence of the shipowner's servants, it was necessary to carry goods beyond their destination in order to avoid undue detention Although the bill of lading gave permission to overcarry to avoid undue delay, it was held that negligence prevented the shipowner from claiming the benefit of the exception Similarly any want of reasonable skill or care in preventing an accident or minimising its consequences, will render the shipowner

(*j*) (1865), L R 1 Q B at p 121
(*k*) *Bavendale* v *G E Ry Co* (1869), 38 L J Q B 137
(*l*) *Elderslie Steamship Co* v *Borthwick* (1905) A C 93
(*m*) (1913), 82 L J K B 374
(*n*) (1904), 20 T L R 390

liable for damage caused by perils of the sea even though they are excepted

Negligence expressly excepted

Broadly speaking, then, negligence avoids the exceptions But this may be negatived by express agreement Thus it is open to the shipowner to stipulate for exemption for damage arising from perils of the sea even when occasioned by negligence In *Blackburn* v *Liverpool, &c , S N Co* (*o*) sugar was stored in a tank at the bottom of the ship The engineer by mistake let salt water into the tank *Held*, the shipowner was not liable because the bill of lading contained an exception of perils of the sea occasioned by negligence

The construction of the exceptions has sometimes been confused by placing upon a wrong basis the distinction between their effect in a bill of lading and the operation of the same phrases (*e g* , perils of the sea) in a contract of marine insurance On the part of the insurer, a contract of marine insurance is a positive undertaking to indemnify the shipowner in the event of the loss of his vessel from certain specified causes such as perils of the sea Consequently it is sufficient to entitle the shipowner to claim the indemnity that he should show that the vessel was lost by perils of the sea On the other hand, the exceptions in a bill of lading are merely limitations of the shipowner's absolute liability as a common carrier (*p*) They relate to certain undertakings implied by law on the part of the shipowner, and he cannot claim the benefit of them if he has been guilty of negligence (*q*)

Burden of proof

If the shipowner relies on an excepted peril, he must prove that the loss or damage was caused thereby Thus,

(*o*) (1902), 85 L T 783
(*p*) *Notara* v *Henderson* (1872), L R 7 Q B , p 235
(*q*) *The Xantho* (1887), 12 A C 503

if it is clear that the damage must have arisen either from bad stowage or from perils of the sea, and the latter are excepted, in order to escape liability the shipowner must show that the damage arose from perils of the sea If *primâ facie* the damage falls within an exception, it lies on the plaintiff to prove negligence or unseaworthiness so as to take the case out of the exception (*r*) In *The Glendarroch* (*s*) cement was shipped under a bill of lading excepting perils of the sea The vessel went ashore, and there was no evidence indicating negligence on the part of the shipowner's servants It was held that the burden of proving such negligence was on the cargo owner

We shall now proceed to consider in detail some of the excepted perils usually introduced into bills of lading

Act of God—This includes any accident due to natural causes directly and exclusively, without human intervention, and which no reasonable foresight could have avoided (*t*) Damage caused by lightning, a storm, or even a sudden gust of wind, may be within this exception But an accident arising from the navigation of a vessel in a fog would not be within the exception because partly due to human intervention (*u*)

In *Nugent* v *Smith* (*v*) a mare was shipped for a voyage from London to Aberdeen No bill of lading was signed The mare died from injuries received during the voyage, due partly to rough weather and partly to her struggles through fright As there was no negligence on the carrier's part, the Court of Appeal held that he was not liable

(*r*) *The Northumbria* (1906), 95 L T 618
(*s*) (1894), 70 L T 344
(*t*) Per James, L J, in *Nugent* v *Smith* (1876), 45 L J Q B, p 708
(*u*) *Liver Alkali Co* v *Johnson* (1874), 43 L J Ex 216
(*v*) 45 L J Q B 19

Mellish, L J , pointed out that a carrier does not insure against acts of nature or against defects in the thing carried (*w*)

In *Siordet* v *Hall* (*a*) goods were shipped under a bill of lading excepting acts of God On the night before she was to sail the ship's boiler was filled, and, owing to frost, a pipe connected with the boiler burst damaging the goods *Held*, although frost was an act of God, negligence in filling the boiler overnight excluded the exception

The King s Enemies —This exception does not cover acts done by robbers (*y*), but only those done by public enemies It is said in Southcote's Case (*z*) to have arisen from the fact that the bailee who had lost the goods had no remedy against public enemies because they were not within the jurisdiction of our Courts It is doubtful whether the exception includes pirates (*a*)

An express exception of the King's enemies covers at least enemies of the State to which the carrier belongs (*b*) As to enemies of the State to which the shipper belongs, it does not appear that the carrier requires protection If the goods are not contraband, they are not liable to seizure , if they are, this would amount to inherent vice in them and the carrier is not responsible

The shipowner must use reasonable care to avoid capture by the enemies' cruisers, and is justified in deviating when there is reasonable danger of capture (*c*)

Restraints of Princes —Besides the cases falling within the previous exception, " restraints of princes " includes

(*w*) 45 L J Q B p 709 (*a*) (1829), 6 L J C P 137
(*y*) *Morse* v *Slue* (1671), 2 Keb 866 (*z*) Cro Eliz 815
(*a*) ' Story on Bailments," section 526, says it does , but *see* Byles, J , in *Russell* v *Niemann*, 34 L J C P at p 14
(*b*) *Russell* v *Niemann*, 34 L J C P 10
(*c*) *The Teutonia* (1872), 41 L J Adm 57

any acts done, even in time of peace, by the sovereign power of the country where the ship may happen to be It covers any restrictions imposed by order of an established government on importation or exportation, *e g*, quarantine regulations, embargoes, blockades or seizure of contraband goods

It does not cover a seizure resulting from ordinary legal proceedings (*d*), nor acts done by a body of persons who are not authorized by the established government Where the shipowner has negligently taken as part of the cargo goods which are likely to cause a seizure, he is liable to other shippers for delay arising from such a seizure and cannot claim the benefit of the exception restraints of princes (*e*)

Risk of seizure

The exception excuses the shipowner from his obligation to deliver at the port of destination where to do so would expose the ship to real danger of seizure Thus in *Nobel's Explosives Co* v *Jenkins* (*f*) goods were shipped in England for Japan under a bill of lading excepting restraints of princes On the day the ship reached Hong Kong, war was declared between Japan and China The captain, therefore, landed at Hong Kong such part of the cargo as was contraband *Held*, the delivery of the contraband goods in Japan was prevented by restraints of princes

Perils of the Sea—This exception covers all dangers which are peculiarly incident to a sea voyage It does not include such accidents as might equally well occur on land For example, where vermin eat part of the cargo the exception does not apply (*g*), for this might happen

(*d*) *Crew* v *G W Steamship Co* (1877), 4 T L R 148
(*e*) *Dunn* v *Currie* (1902), 2 K B 614
(*f*) (1896), 2 Q B 326
(*g*) *Kay* v *Wheeler* (1867), 36 L J C P 180

in a granary on land Nor is damage arising from bursting of boilers within the exception (*h*) In *The Thrunscoe* (*i*), however, the ventilators of the hold had to be kept closed owing to bad weather Consequently heat from the engines and boilers injured the cargo The severity of the weather was regarded as the direct cause of the damage and this was accordingly held to be due to a peril of the sea

The term peril implies some casualty which could not have been foreseen as necessarily incident to the voyage, *e g*, the presence of icebergs in unusual latitudes The occurrence need not be a rare or an extraordinary one Thus it is not rare for rough seas to beat into a ship or for a vessel to strand on rocks during fog, but both these would be within the exception, unless there was negligence on the part of those in charge of the ship On the other hand, damage caused under ordinary climatic conditions by water entering the vessel, owing to the decayed state of her timbers, is not within the exception (*j*)

Proximate cause

Where damage is caused by the operation of several agencies, including a peril of the sea, will the shipowner be liable? This question was finally settled in *Hamilton* v *Pandorf* (*k*) Rats on board the vessel gnawed a hole in a lead pipe, thus letting in sea water, which damaged the cargo *Held*, the proximate cause of the damage was sea water and the exception perils of the sea applied

In *The Xantho* (*l*) and *Hamilton* v *Pandorf* (*k*) the House of Lords decided that where the proximate cause of the damage is an excepted peril the shipowner is excused although other causes were at work He is not excused

(*h*) *Thames and Mersey, &c, Co* v *Hamilton* (1887), 12 A C 484
(*i*) (1897), P 301
(*j*) *Sassoon* v *Western Assurance Co* (1912), A C 561
(*k*) (1887), 12 A C 518
(*l*) (1887), 12 A C 503

by the fact that a remote cause of the loss was an excepted peril But it is clear from the judgment of Lord Watson in the latter case that, even if the proximate cause was an excepted peril, the Court is not precluded from ascertaining whether this cause was brought into operation by the shipowner's negligence, if it was, he will be liable

An excepted peril may prevent delivery of the cargo indirectly It may render repairs necessary, and for this purpose the cargo may have to be discharged If loss or damage arises from such discharge, the excepted peril will excuse the shipowner unless he is negligent (*n*) At the same time *Green* v *Elmslie* (*o*) appears to be still good law In that case the ship was driven ashore on an enemy's coast in a storm and the cargo was seized by the inhabitants It was held that the cause of the loss was the seizure and not perils of the sea

It was formerly held that a collision resulting from negligence was not a peril of the sea That view has been abandoned since the case of *The Xantho* (*p*) Provided the collision was due to inevitable accident or solely to the negligence of the other vessel, the carrier is protected by an exception of perils of the sea But if those in charge of the carrying ship could have avoided the collision by due care, the carrier is liable Collision

Where perils of the sea are excepted the cargo owner has the following remedies for damage by collision

(1) If the carrying ship alone was to blame, he can sue on the bill of lading

(2) If the other ship alone was in fault, he can sue its owner in tort

(3) If both ships were to blame, he can recover a portion

(*n*) *Garston Co* v *Hickie* (1886), 18 Q B D 17
(*o*) (1794), Peake N P 278 (*p*) (1887), 12 A C 503

of the damage from each Prior to the Maritime Conven tions Act, 1911, this portion was half from each ship Since that Act the shipowners must contribute in propor tion to the degree of blame attributable to each

But if the bill of lading excepts perils of the sea or collisions even though caused by negligence of the ship owner, he will not be liable to the cargo owner at all

Barratry —Barratry is any act of fraud or violence done by the master or crew, without the consent of the ship owner, which exposes the ship or goods to damage or loss Thus, if the master wilfully scuttles the ship, fraudulently sells the cargo (*q*), uses the vessel for smuggling (*r*), or fraudulently deviates (*s*), each of these acts is barratrous Where the master is obeying the orders of the owner's agent his act cannot be barratrous In the case of a charter by demise, the master is a servant of the charterer and not of the owner, and therefore his acts may be barra trous as against the charterer although done with the owner's assent (*t*)

In *The Chasca* (*u*) a cargo of wheat was damaged by the felonious act of the crew in boring holes in the ship's side The bill of lading excepted only dangers of the seas and fire It was held that this barratrous act of the crew was not a peril of the sea, and therefore the shipowner was liable for the damage

Statutory Exceptions —The Merchant Shipping Act, 1894, section 502, contains the following provisions limiting the shipowner's liability for loss of or damage to goods on board

(1) Valuables must be declared, otherwise the shipowner

(*q*) *Jones* v *Nicholson* (1854), 23 L J Ex 330
(*r*) *Havelock* v *Hancill* (1789), 3 T R 277
(*s*) *Ross* v *Hunter* (1790), 4 T R 33
(*t*) *Soares* v *Thornton* (1817), 7 Taun 627
(*u*) (1875), 44 L J Adm 17.

will not be liable for their loss by theft or embezzlement while they are on board This covers gold, silver, precious stones, and watches The true nature and value of the goods must be declared in writing

(2) Fire The shipowner is not liable for loss of or damage to cargo by reason of fire on board

Both exceptions apply only to the owner of a British sea going ship and only when the loss arises without his actual fault or privity (*v*) The fault or privity of his servants (*e g*, officers on board) is not sufficient to render the shipowner liable

The statutory exception as to fire applies even though there has been a breach of the warranty of seaworthiness (*w*) But where a vessel's boilers were so defective that any reasonable man would know that they could not last long, and by reason of this unseaworthiness the vessel stranded and took fire, it was held that the shipowners could not claim the benefit of this section The warranty of seaworthiness being an absolute undertaking, there may be an innocent breach of it which will not amount to fault or privity within the above section

Sometimes fire is one of the perils excepted in the contract of affreightment In some respects such an express exception is wider and in others narrower than the statutory exception The latter applies only to damage done to goods while they are on board, it does not apply where the goods are injured by fire on a lighter used by the shipowner in carrying the goods from the shore to be loaded on board the ship (*x*) The express exception operates

(*v*) *Asiatic Petrol Co* v *Lennards* (1913), 29 T L R 50

(*w*) *Virginia, &c, Co* v *Norfolk S S Co* (1913) 28 T L R 16

(*x*) *Morewood* v *Pollock* (1853), 22 L J Q B 250 The statutory exception as to fire existed a century before the Merchant Shipping Act, 1894

during the whole time the goods are in the hands of the shipowner as carrier

On the other hand, the express exception will not excuse the shipowner where the fire is caused by the negligence of his servants, whereas the statutory exception applies in all cases except where the shipowner is directly in fault Finally, as we have seen, the statutory exception may apply although there has been a breach of the undertaking as to seaworthiness But where the operation of the statutory exception is excluded by the terms of the bill of lading, the shipowner will be liable for damage by fire caused by unseaworthiness even though fire is excepted in the bill of lading (*y*)

(*y*) *Ingram* v *Services Maritime du Tréport* (1913), 29 T L R 274

CHAPTER IV

CHARTER PARTIES.

Analysis of a Charter party

(1) The shipowner agrees to provide a ship and is liable to an action if he fails to do so — Undertakings by the shipowner.

(2) As to the preliminary voyage to the port of loading, the shipowner promises that the ship shall proceed with reasonable dispatch Failure to do so gives rise to an action for damages and may even entitle the charterer to refuse to load

(3) The shipowner makes certain representations of fact regarding the ship, *e g*, that she is "tight, staunch, and every way fitted for the voyage" These may amount to warranties or they may have no legal consequence at all

(4) The shipowner undertakes to carry the goods to their destination If he fails to do so, an action for non delivery lies

(5) The charterer agrees to provide a full cargo, and is liable to an action if he fails to load — By the charterer

(6) The charterer agrees to pay freight This is usually so much per ton of goods or per cubic foot of space If the charterer does not supply a full cargo he must pay compensation for the unoccupied space Such a payment is called "dead freight"

Generally the charter party also contains

(7) Clauses restricting the liability of the shipowner for loss of or damage to the goods These are the excepted — Excepted perils.

perils, and they are sometimes made to apply to failure by the charterer to fulfil his obligations

Demurrage

(8) Provisions regulating the manner of loading and discharge and especially the time to be allowed for these operations The charter usually fixes a number of days—called lay days—for loading and discharge, and allows certain further days at a specified rate of payment called demurrage

In addition to the above undertakings and provisions, there are the usual obligations implied by law in every contract of carriage by sea—that the ship shall be sea worthy at the commencement of the voyage and shall proceed with reasonable dispatch and without deviation For a discussion of these *see* chapter v

Remedies for misrepresentation

Representations in a Charter party—In the law of contract a misrepresentation may give rise to one of two remedies It may confer on the injured party a right

(1) To rescind the contract, or

(2) to bring an action for damages for the loss he has sustained by acting on the misrepresentation

The former arises when the term of the contract misrepresented is intended to be vital to the contract, the latter when the misrepresentation is such as inflicts loss on the party deceived but does not go to the root of the contract

Rescission

The position of the ship at the time a charter is made is generally a material part of the contract, and consequently a misrepresentation on that point may entitle the charterer to refuse to load Thus in *Behn* v *Burness* (*a*) a charter was made on October 19 for a ship, described as "now in the port of Amsterdam," to proceed with all possible dispatch to Newport and there load a cargo She

(*a*) (1863), 32 L J Q B 204

did not in fact arrive at Amsterdam until four days later It was held that the charterer was justified in refusing to load

In *Frazer* v *Telegraph Construction Co* (*b*) the bill of lading represented the vessel as being a steamship, whereas her steam power was only auxiliary The voyage was carried out in the main under sail and therefore took much longer than it would have taken a steamer *Held*, the shipowner had not fulfilled his obligation, which was to provide a ship propelled mainly by steam power, and the shipper of the goods was entitled to damages for the delay Damages

If the party who has a right to rescind the contract elects to go on with it, so that the position of the parties is changed, he must abide by the contract but can sue for damages for any loss he has sustained In *Pust* v *Dowie* (*c*) a ship was chartered for a lump sum on condition that she took a cargo of 1000 tons In the special circumstances of the voyage she could not take that amount, but the charterers loaded her and she sailed In an action for the freight it was held that there was no breach of the condition, and, even if there had been, the charterers had waived their right to rescind They must pay the freight subject only to a set off as damages Waiver of right to rescind

In *Bentsen* v *Taylor* (*d*) by a charter party dated March 29, the ship, described as "now about to sail to the United Kingdom," was to go to Quebec for timber after discharging in the United Kingdom She did not in fact sail until April 23 The charterers informed the shipowners that they would load under protest as to extra expense When the ship reached Quebec they refused to load *Held*, the representation "now about to sail"

(*b*) (1872), 20 W R 724 (*c*) (1864), 34 L J Q B 127
(*d*) (1893), 2 Q B D 274.

was a substantive part of the contract, and its breach gave the charterers a right to rescind but their conduct amounted to a waiver of this right They were therefore liable for freight under the charter party, but were entitled to damages resulting from the delay in the ship's sailing

Statements as to capacity of ship

A representation as to the ship's capacity or measured tonnage does not, as a rule, bind the shipowner, but a representation as to her capacity for a particular cargo may do so The charterer's undertaking is to load a full cargo, not one equal to the ship's burden as stated in the charter party Consequently, in *Hunter* v *Fry* (*e*) where the ship was described as "of the burden of 261 tons or thereabouts," but could have carried 400 tons of the agreed cargo, the shipowner obtained damages for loss of freight arising from the fact that only 336 tons were shipped (*f*) Similarly where the ship was described as "of the measurement of 180 to 200 tons or thereabouts," the charterer was not entitled to refuse to load her because in fact she measured 257 tons (*g*)

But in *Hassan* v *Runciman* (*h*) an oral representation that the vessel had previously carried a certain amount of the same kind of cargo (esparto) was held to amount to a warranty, and, as the representation was false, the charterers obtained damages In this case the freight agreed on was a lump sum fixed on the basis of the representation as to the ship's capacity

When they apply

Charter-party Excepted Perils —In the case of a charter party, the exceptions apply not only to the voyage itself, but also to the preliminary voyage and to the loading and unloading Apart from a contrary intention in the terms

(*e*) (1819), 2 B & Ald 421
(*f*) Such a payment is called "dead freight"
(*g*) *Windle* v *Barker* (1856), 25 L J Q B 349.
(*h*) (1904), 91 L T 808

of the demurrage clause, the excepted perils do not apply during any detention of the ship beyond the agreed period for loading and unloading But when the vessel is proceeding to the port of loading, even though she is carrying goods for other merchants (*i*), the exceptions apply Hence if the ship is prevented from or delayed in getting to the loading port by a peril excepted "during the voyage," the exception applies (*j*) This, however, is the case only when the preliminary voyage is clearly incidental to the main voyage If the ship is disabled by excepted perils while completing a voyage on which she was engaged at the time of chartering, the shipowner will not be excused (*k*)

Their effect

Where the exceptions relate to the whole of the charter party, the fact that the delay was caused by an excepted peril is a good defence to an action for damages for failure to start for the loading port by an agreed date, but this will not affect the charterer's right to rescind the contract if the ship does not sail or arrive by an agreed date The latter right is an absolute one and is not subject to the exceptions (*k*) In other words, the excepted perils only operate to relieve from liability, they do not enable the shipowner to plead that he has performed an obligation which he has not performed A good parallel is afforded by the case of freight Freight can only be earned (generally speaking) by delivering the goods at the port of destination Consequently no freight is payable if the ship is prevented from completing the voyage even by excepted perils On the other hand, excepted perils are a good defence to an action for damages for failure to deliver the cargo

(*i*) *Hudson* v *Hill* (1874), 43 L J C P 273
(*j*) *Harrison* v *Garthorne* (1872), 26 L T 508
(*k*) *Crookewit* v *Fletcher* (1857), 26 L J Ex 153

Do they apply to the charterer?

It was formerly held that the excepted perils in a charter party are for the benefit of the shipowner only (*l*) as they certainly are in the case of a bill of lading. Modern decisions do not support this view. Frequently the perils are stated to be mutually excepted, and then the charterer is clearly entitled to the benefit of them if he is prevented from loading. And where the contract shows an intention that the exceptions should be mutual, they are held to excuse the charterer as well as the shipowner (*m*).

Proceeding to the Port of Loading.—The undertaking to proceed to the port of loading may be

(1) An absolute undertaking to sail for or arrive at such port by a fixed date.

(2) An undertaking merely to use reasonable diligence, *e g*, "proceed with all convenient dispatch."

Undertaking (1) to proceed by a fixed date

In the former case, it is a condition precedent to the charterer's liability to load that the ship shall sail or arrive by the date named. Thus in *Glaholm* v *Hays* (*n*) a charter party provided that the vessel was to sail from England for the port of loading on or before February 4. She did not sail until February 22. *Held*, the charterer was not bound to load. And the charterer can refuse to load even though the ship was prevented from arriving by excepted perils (*o*).

(2) to proceed with dispatch

But where no definite time is fixed, the undertaking is to proceed in a reasonable time. In that case, if the delay does not defeat the charterer's object in engaging the ship, he must load and seek his remedy for any loss caused by the delay in an action for damages. In *MacAndrew* v *Chapple* (*p*) it was held that a deviation causing a delay

(*l*) *Blight* v *Page* (1801), 3 B & P 295 n.
(*m*) *Barrie* v *Peruvian Corporation* (1896), 2 Com Ca 50.
(*n*) (1841), 2 Man & G 257.
(*o*) *Crookewit* v *Fletcher* (1857), 26 L J Ex 153.
(*p*) (1866), 35 L J C P 281.

of a few days was not calculated to frustrate the object of the contract Hence, though the charterer could sue in damages, he was not entitled to refuse to load

If, however, the undertaking to use diligence is broken in such a way as to frustrate the object of the adventure, the charterer will even in this case be entitled to refuse to load In *Freeman* v *Taylor* (*q*) the ship was to go to Cape Town and then proceed with all convenient speed to Bombay By reasonable diligence she might have arrived at Bombay six weeks earlier than she did arrive *Held*, the charterer was justified in refusing to load

In *Jackson* v *Union Marine Insurance Co* (*r*) a ship was chartered to proceed with all convenient speed from Liverpool to Newport to load iron rails for San Francisco She went aground on the way to Newport and could not be got off and repaired for some months As the rails were urgently needed in San Francisco, the charterers engaged another ship *Held*, they were justified in doing so It should be observed that, as the delay arose from excepted perils, the charterers could not have recovered damages from the shipowner in respect thereof

Notice that ship is ready to load

The Loading —It is the shipowner's duty to send the ship to the usual or agreed place of loading He must give notice to the charterer that the ship is ready to load If he fails to do so, and delay in commencing to load is thereby caused, the charterer will not be responsible as he is not bound to look out for the ship (*s*) If the place named for loading be simply a port or dock, notice may be given as soon as the ship arrives in the port or dock although she is not in the particular spot where the loading is to

(*q*) (1831), 1 L J C P 26
(*r*) (1873), 42 L J C P 284
(*s*) *Stanton* v *Austin* (1872), 41 L J C P 218

take place, but this cannot be done when the place is more particularly indicated (*t*)

Custom as to loading

Apart from custom or express agreement, the cargo owner must bring the goods to the place where the ship is lying Where a custom as to loading obtains at the port, it will bind even persons ignorant of it unless it is inconsistent with the written contract Provided such a custom is reasonable, certain and not contrary to law, there is a presumption that the parties contracted with reference to it This can be rebutted only by the inconsistency of the custom with the express terms of the contract (*u*)

Responsibility of shipowner commences

The shipowner becomes responsible for the goods directly they are handed over to the mate or other servant of the shipowner authorized to receive them The expense and risk of shipping the goods generally fall upon the shipowner Where he has agreed to receive the goods at a distance from the ship, he is liable for any loss or damage to them while they are being taken to the ship But he is entitled to the protection of the excepted perils stipulated for in relation to the voyage (*v*) In *The Carron Park* (*w*) damage was done to the cargo owing to the negligence of one of the ship's engineers in allowing water to get into the ship during loading As the charter party excepted negligence of the shipowner's servants during the voyage, it was held that he was not responsible for the damage

Place of loading

Where the contract stipulates that the cargo is to be brought "alongside" by the charterer, the expense and risk of doing so is transferred to him He must actually

(*t*) *Nelson* v *Dahl* (1881), 12 Ch D at p 581
(*u*) *The Nifa* (1892), 62 L J P 12
(*v*) *Nottebohm* v *Richter* (1886), 56 L J Q B 33
(*w*) (1890), 59 L J Adm 74

bring the cargo to the ship's side, and, if necessary, bear the cost of lighterage

The charter does not, as a rule, contain provisions as to how the cargo is to be procured It presupposes that the charterer has the cargo in readiness on the quay (*x*) At some ports, however, there is no storing accommodation, and goods have to be brought from storing places at some distance from the actual place of loading In such cases, the charterer will be entitled to the benefit of the excepted perils during the transit from the storing places (*y*), provided such transit substantially forms part of the operation of loading In *Aidan Steamship Co* v *Weir* (*z*) it was customary at the port of loading to ship coal direct from the colliery, there being no facilities for storing at the port The charterer failed to procure a cargo within the time agreed on He was held liable for the delay because the exceptions apply only to the actual loading not to delay in procuring a cargo But where no definite time for loading is fixed, and to the knowledge of the parties delay may arise in procuring a cargo from the particular place agreed on, this is a matter to be considered in determining what is a reasonable time for loading

Excuses for not providing cargo

The fact that it has become impossible to provide a cargo does not, as a rule, relieve the charterer of liability In the following cases, however, he is excused

(1) Where events have rendered performance of the contract illegal by English law (*a*)

(2) Where the shipowner has broken a condition precedent, *e g*, to provide a seaworthy ship

(*x*) *Kay* v *Field* (1882), per Lord Lindley, 10 Q B D 249

(*y*) *Allerton Sailing Ship Co* v *Fall* (1888), 6 Asp M C 287

(*z*) (1905), A C 501

(*a*) *Esposito* v *Bowden* (1857), 27 L J Q B 17

(3) Where there are express provisions in the contract which relieve him in certain circumstances

Performance illegal

In *Blight* v *Page* (*b*) the charterer agreed to load a cargo of barley at a Russian port The export of barley was subsequently forbidden by Russia Nevertheless the charterer was held liable On the other hand, in *Esposito* v *Bowden* (*c*) a cargo of wheat was to be loaded at Odessa Before the ship arrived there, war broke out between England and Russia *Held,* the charterer was relieved from liability to load a cargo The difference between these two cases is that, in the latter, performance of the contract would have been contrary to English law as trading with an enemy

Ship un seaworthy

That the ship shall be seaworthy is a condition precedent to the charterer's obligation to load her In *Stanton* v *Richardson* (*d*) the ship was not provided with sufficient pumping machinery to deal with the drainage from the cargo Consequently the cargo had to be discharged, and the charterer refused to reload it or to load any of the other articles provided for in the charter party The jury found that the ship was not reasonably fit to receive the cargo offered and could not be made so in a reasonable time having regard to the objects of the charter party *Held,* the charterer was excused from loading and could recover damages from the shipowner for failing to provide a ship fit to receive the cargo

Express provisions

In *Gordon Steamship Co* v *Moxey* (*e*) a ship was chartered to carry coal from Penarth to Buenos Ayres The charter-

(*b*) (1801), 3 B & P 295 n The charter party contained an exception of restraints of princes, but at that time it was considered that the exceptions did not apply in favour of the charterer Modern cases are against this view (*Vide supra,* p 38)

(*c*) *Esposito* v *Bowden* (1857) 27 L J Q B 17

(*d*) (1874), 45 L J C P 78 (*e*) (1913), 18 Com Ca 170

party provided that, in the event of a strike or lock out causing a stoppage among coal workers, the charter was to be void if the stoppage lasted six running days from the time when the vessel was ready to load On April 4, 1912, the ship was ready to load, but, owing to the great coal strike, no coal arrived at Penarth for shipment until April 11 *Held*, although the strike itself ended on April 9, the stoppage was due to it, and the charterers were entitled to cancel the charter

But as a rule the charter does not contain provisions as to how the cargo is to be procured It is assumed as the basis of the charter party that the charterer will have the cargo ready to load Hence, even when there are express clauses exempting him from delay in loading, they are generally construed as applying only to the actual loading This is in accordance with the rule that exceptions are construed strictly against the party in whose favour they are inserted In *Grant* v *Coverdale* (*f*) the ship was to proceed to Cardiff and load iron The time for loading was to commence as soon as the vessel was ready to load except in case of strikes, frosts, or other unavoidable accidents preventing the loading Owing to frost, delay occurred in bringing the cargo to the dock *Held*, the charterer was liable In the course of his judgment Lord Selborne remarked, "It would appear to me to be unreasonable to suppose, unless the words make it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation of loading"

Either party is released if, before the time for perform- Renunciation by one party

(*f*) (1884), 9 A C 470

ance the other has renounced the contract or made it impossible to perform his part Where one party has renounced, the other may accept this and treat the contract as at an end (*g*), or he may continue to treat the contract as subsisting In *Avery* v *Bowden* (*h*) the agreement was to load a cargo of wheat at Odessa When the ship arrived, the charterer's agent informed the master that he had no cargo to load The master remained at Odessa and declined to treat this as a final refusal to load War broke out between England and Russia, and the contract was thus dissolved by law *Held*, there was no evidence that the charterer had dispensed with the ship's services before the declaration of war, and he was therefore not liable for breach of contract The charterer's breach of contract in not providing a cargo is not complete until the lay days have expired

Shipowner must take a full cargo if tendered

The obligation on the charterer to load a cargo involves a corresponding duty on the part of the shipowner to receive it

In *Atkinson* v *Ritchie* (*i*) the master, fearing an embargo, sailed away without loading a full cargo although the charterer had provided one *Held*, the shipowner was liable in damages

In *Darling* v *Raeburn* (*j*) the shipowner for his own purposes took on board bunker coal much in excess of his requirements for the voyage This made it necessary to lighten the ship in order to enter one of the ports of call *Held*, the shipowner must bear the expense of this lightening as he had no right to take on board more coal than was required for the voyage

(*g*) *Danube and Black Sea Co* v *Zenos* (1861), 31 L J C P 284
(*h*) (1856), 26 L J Q B 3
(*i*) (1809), 10 East 530. (*j*) (1907), 1 K B 846

Where the shipowner himself undertakes to procure a cargo he is under the same strict liability as usually falls on the charterer In *Hills* v *Sughrue* (*k*) the shipowner agreed to proceed to a certain island and there, with his own crew, load a cargo of guano free from dirt There was no guano free from dirt on the island Nevertheless the shipowner was held liable

Meaning of full cargo

A full and complete cargo means a cargo sufficient to fill the holds of the ship as far as they can be filled with safety It does not, as a rule, bind the charterer to load deck cargo The reason of the obligation to load a full cargo is that otherwise the shipowner would lose freight on account of some part of the ship's carrying capacity not being utilized Hence, if a full cargo is not loaded, the charterer must pay not only freight on the goods actually shipped but also damages at the same rate in respect of the unoccupied space The latter payment is called "dead freight," and the obligation to pay it is sometimes transferred to holders of the bills of lading by means of a cesser clause which gives a lien for dead freight on the goods shipped (*l*)

Dead freight

"and/or" other lawful merchandise.

The proviso "$\frac{\text{and}}{\text{or}}$ other lawful merchandise" gives the charterer an option as to the cargo he will load In *Moorsom* v *Page* (*m*) the charter party provided for a cargo of "copper, tallow, and hides or other goods" Tallow and hides were tendered, but the shipowner demanded copper as well It was held that the option was with the charterer even though ballast was required as a consequence of his selecting the lighter articles

The term "lawful merchandise" means such goods

(*k*) (1846), 15 M & W 253
(*l*) *See* chap IX
(*m*) (1803), 4 Camp 103

as are ordinarily shipped from the port of loading (*n*) The expression is construed *ejusdem generis*, *i e*, it includes only merchandise of the same kind as that specified Moreover, it is construed by reference to the contract as a whole Thus in *Warren* v *Peabody* (*o*) the charterer was to load a cargo of produce including "Indian corn or other grain," freight being payable at 11*s* per quarter of 480 lb *Held*, the charterer was not entitled to load oats at that rate of freight because they are much lighter than 480 lb to the quarter, and therefore take up more room

Stowage

The shipowner must provide for the proper stowing of the cargo and, if necessary, supply dunnage and ballast to make the ship seaworthy Dunnage is the name given to the provision made in stowing goods to protect them from damage by contact with other goods or with the sides of the ship It also covers provision for preserving ventilation and outlets for drainage from the cargo

Broken stowage

Some cargoes are of such a nature that they do not fill up all the available space Considerable room is sometimes left, *e g*, between logs of timber or hogsheads of sugar This space is called broken stowage Where the charterer has an option of loading several kinds of goods, he must, if possible, fill up this space In *Cole* v *Meek* (*p*) the charterer was to provide a cargo of sugar and other lawful produce He loaded mahogany logs, which were produce of the port of loading, but left spaces between the logs *Held*, he was bound to provide sugar or other produce of the port of loading to fill the spaces, and must pay damages for not doing so

But the charterer may be excused from liability for

(*n*) *Vanderspar* v *Duncan* (1891), 8 T L R 30
(*o*) (1849), 19 L J C P 43 (*p*) (1864), 33 L J C P 183,

broken stowage by a custom of the port of loading In *Cuthbert* v *Cumming* (*q*) a charter-party provided for a cargo of sugar, molasses $\frac{\text{and}}{\text{or}}$ other lawful produce It was customary at the port of loading to load sugar and molasses in hogsheads and puncheons This was done, but spaces were left large enough to take small packages of sugar, cocoa, &c *Held*, it was sufficient for the charterer to load in the customary way

Master must be a competent stevedore

Moreover, the master of the ship is bound in law to be a competent stevedore He is responsible for the proper stowage of the cargo Consequently if he stows the goods so that broken stowage is left, whereas by proper stowing it could have been filled, the charterer will not be liable

Where, however, the charterers were well aware of the method of stowing, and the master's ignorance of its probable consequences did not amount to negligence, it was held that the shipowner was not liable This was decided in *Ohrloff* v *Briscal* (*r*) where casks of oil were stowed in the same hold with bales of wool The wool became heated, dried the wood in the casks and caused them to leak

Dangerous cargo

Any person who ships goods impliedly warrants that they are not dangerous when carried in the ordinary way unless

(1) he expressly notifies the shipowner to the contrary,

(2) the shipowner knows, or ought to know, that they are dangerous

In *Brass* v *Maitland* (*s*) bleaching powder containing chloride of lime was shipped and damaged other goods on board The shipowner having been made liable for the damage, sued the shipper of the bleaching powder

(*q*) (1855), 24 L J Ex 198, 310 (*r*) (1866), 35 L J P C 63
(*s*) (1856) 6 Ellis and Blackburn 471

CHAPTER V

IMPLIED UNDERTAKINGS BY THE SHIPOWNER

In all contracts of carriage by sea the following undertakings are implied on behalf of the shipowner

I As to the state of the vessel

He absolutely warrants that the vessel is seaworthy

II As to the conduct of the voyage

He undertakes that the ship

(1) shall proceed with reasonable dispatch,

(2) shall not unjustifiably deviate

May be varied by agreement

The above undertakings may be excluded or varied to any extent by express contract The policy of English law, unlike that of the United States and most continental countries, is to leave the shipowner, charterer, and shipper to make whatever contract they please Thus it is quite lawful for the shipowner to insert in the contract a clause exempting him from liability for the negligence of himself and his servants, whereas under the Harter Act, 1893, such a clause would be absolutely void in the United States Again, provided he makes the stipulation sufficiently definite, the shipowner can, by English law, contract himself out of his liability to provide a seaworthy ship In the United States, however, such a stipulation would be void so far as it relieved the shipowner from liability to exercise due diligence in seeing that the ship was seaworthy On the other hand, the Harter Act limits the shipowner's undertaking to an obligation to exercise due

diligence, whereas the obligation implied by English law is absolute, *i e*, the vessel must be in fact seaworthy

Nature of the undertaking

Seaworthiness—There is an implied undertaking in every contract of carriage by sea that the ship shall be seaworthy for the particular voyage and for the cargo carried (*a*) The shipowner undertakes not merely that he has taken every precaution, but that in fact the ship is seaworthy It is no defence that he did not know of the existence of a defect (*b*) But his undertaking relates merely to the ordinary perils likely to be encountered on such a voyage with the cargo agreed on He does not guarantee that the ship will stand any weather, however stormy In *McFadden* v *Blue Star Line* (*c*) the following test was laid down Would a prudent owner have required the defect to be remedied before sending his ship to sea if he had known of it? If he would, the ship was unsea worthy

Condition or warranty

Prior to the commencement of the voyage the under taking as to seaworthiness is a condition Hence if the charterer or shipper discovers that the ship is unseaworthy before the voyage begins and the defect cannot be remedied within a reasonable time, he may throw up the contract In *Stanton* v *Richardson* (*a*) a ship was chartered to take a cargo including wet sugar When the bulk of the sugar had been loaded, it was found that the pumps were not of sufficient capacity to remove the drainage from the sugar, and the cargo had to be discharged Adequate pumping machinery could not be obtained for a considerable time, and the charterer refused to reload *Held*, the ship was unseaworthy for the cargo agreed on, and as it could not

(*a*) *Stanton* v *Richardson* (1874), 33 L T 193
(*b*) *The Glenfruin* (1885), 52 L T 769
(*c*) (1905), 1 K B at p 706

be made fit within a reasonable time, the charterer was justified in refusing to reload

After the voyage has begun the undertaking becomes merely a warranty, *i e*, the charterer or shipper is no longer in a position to rescind the contract but can claim damages for any loss caused by unseaworthiness In *The Europa* (*d*) the ship was unseaworthy at starting by reason of defective bulkheads She collided with a pier and sea water got into one hold Owing to the faulty bulk heads, the water also damaged goods in the other hold For the latter damage the shipowner was held liable, as it arose from unseaworthiness, but for the former he was excused because the bill of lading excepted perils of the sea

This case illustrates the effect of excepted perils in relation to the undertaking as to seaworthiness The excepted perils do not in any way limit the undertaking The question of liability where the cargo on board an unseaworthy ship is damaged by excepted perils is one of causation If the loss or damage to the goods would not have occurred unless the ship had been unseaworthy, the shipowner is liable If it would have occurred whether the ship was seaworthy or not, the shipowner is excused

Burden of proof

The burden of proving unseaworthiness is upon those who allege it, but there are certain special classes of facts which go far towards raising an inference that the ship was unseaworthy Thus, if a vessel is obliged to return to port shortly after the voyage has begun it may fairly be inferred, in the absence of explanation, that she was unseaworthy at starting The whole evidence in the case must be weighed, but when those who allege unsea

(*d*) (1908), P 84

worthiness prove a mass of facts bearing upon the record of a vessel which founders or breaks down shortly after setting sail, they raise a presumption against seaworthiness which can be rebutted only by proof that the loss occurred from a different cause (*e*)

Ship must be fit for agreed cargo

The ship must be seaworthy with reference to the cargo agreed on (*f*) Proper appliances to deal with special cargoes are necessary Where the contract is to carry frozen meat the ship is unseaworthy unless provided with suitable refrigerating machinery (*g*) And a ship regularly employed in carrying the precious metals is unseaworthy unless it contains a strong room reasonably fit to resist thieves (*h*)

In *Tattersall* v *National Steamship Co* (*i*) the ship, after discharging cattle suffering from foot and mouth disease, was not properly disinfected before a fresh cargo of cattle was put on board The shipowners had to make good the whole damage in spite of a clause in the bill of lading limiting their liability to £5 per head of the cattle This case clearly illustrates the absoluteness of the undertaking as to seaworthiness If the shipowners' liability had been merely to use reasonable care, the limitation would have been held good

Seaworthy at time of sailing

The ship must be seaworthy at the time of sailing In reality the undertaking here is twofold

(1) That she is fit to receive the cargo at the time of loading

(2) That she is seaworthy at the time of sailing And whereas the latter is operative throughout the voyage,

(*e*) *See Lindsay* v *Klein* (1911), A C at p 205
(*f*) *See Stanton* v *Richardson*, 33 L T 193
(*g*) *Cargo per Maori King* v *Hughes* (1895), 64 L J Q B 744
(*h*) *Queensland Nat Bank* v *P & O Co* (1898), 1 Q B 567
(*i*) (1884), 50 L T 299

the former applies only at the time of loading Thus, in *McFadden* v *Blue Star Line* (*j*) a defect arising after the cargo had been shipped was held to be no breach of the warranty of cargo worthiness

In *Cohen* v *Davidson* (*k*) the ship was seaworthy when she began to load but not when she put to sea *Held*, the ship must be seaworthy at the time of sailing She may be unfit to put to sea at the time of loading, provided she is fit for loading, but she must not commence the voyage in that condition

In a time charter the warranty applies at the commencement of the hiring, not at the beginning of each voyage (*l*)

Fit to encounter ordinary perils

The ship must be fit to encounter the ordinary perils of the sea In *Kopitoff* v *Wilson* (*m*) armour plates were put on board but were not properly fastened down Owing to rough weather, one of the plates broke loose and went through the ship's side The jury found that by reason of bad stowage the ship was not reasonably fit to encounter the ordinary perils of the voyage, and judgment was entered against the shipowner for the value of the armour plates

Representation in a charter party as to seaworthiness

A clause in a charter party that the ship is to be "tight, staunch, and strong, and every way fitted for the voyage," relates to the preliminary voyage to the port of loading It refers to the time at which the contract is made (*n*) or to the time of sailing *for* the port of loading The warranty of seaworthiness implied by law, on the other hand, relates to the time of sailing *from* the port of loading .The express undertaking, therefore, does not displace the

(*j*) (1905), 1 K B 697 (*k*) (1877), 46 L J Q B 305
(*l*) *Gaertsen* v *Turnbull* (1908), S C 1101
(*m*) (1876), 34 L T 677
(*n*) *Scott* v *Foley* (1899), 5 Com Ca 53

warranty implied by law In *Seville Sulphur, &c, Co* v *Colvils* (*o*), under a charter containing the above clause the ship was to proceed to Seville and there load The ship was unseaworthy on leaving Seville, and this was held to be a breach of the warranty implied by law

A breach of the implied warranty of seaworthiness at the port of loading entitles the charterer to refuse to load (*p*), but a breach of the express warranty does not, unless it is such as to frustrate the object of the charter (*q*) This difference arises from the different times to which the express and the implied warranties relate The charterer's obligation to load is conditional upon the ship being seaworthy at the port of loading, not upon her being seaworthy at the time the contract was made

Undertaking of Reasonable Dispatch —The shipowner undertakes that the ship shall proceed on the voyage with reasonable dispatch If he fails to carry out this undertaking, the freighter's remedy depends upon whether the failure is such as to frustrate the venture as a commercial enterprise If it is, he may repudiate the contract, if it is not, he has an action for damages for the delay, but to this the plea of excepted perils is a good answer

In *Jackson* v *Union Marine Insurance Co* (*r*) a ship was chartered in November 1871 to proceed to Newport and there load iron rails for San Francisco She sailed for Newport on January 2, 1872, but was stranded on the way and could not be repaired for some months On February 15 the charterers repudiated the charter *Held*, they had a right to do so As the delay arose from perils of the sea which were excepted by the charter party, the

(*o*) (1888), 25 Sc L R 437
(*p*) *Stanton* v *Richardson* (1874), 45 L J C P 78
(*q*) *Tarrabochia* v *Hickie* (1856), 26 L J Ex 26
(*r*) (1873), 42 L J C P 284

shipowner was not liable in damages for failure to perform his contract

Ship must proceed direct

Deviation.—It is an implied condition in every contract of carriage by sea that the ship shall proceed on the voyage without unnecessary deviation If the voyage is not prescribed, the ship must follow the ordinary trade route But the terms of the contract often give the shipowner the right to call at ports out of the ordinary course of the voyage Vague general terms, however, will not be construed as conferring an unlimited right to deviate Thus in *Leduc* v *Ward* (*s*) the bill of lading gave "liberty to call at any ports in any order and to deviate for the purpose of saving life or property" The voyage was from Fiume to Dunkirk, and the ship went out of her course to Glasgow She was lost in a storm in the Clyde *Held*, the above clause merely gave a right to call at any ports in the ordinary course of the voyage, and the deviation to Glasgow was not protected by it

In *Glynn* v *Margetson* (*t*) the clause gave liberty to call at any ports in the Mediterranean and in any order Oranges were shipped at Malaga for Liverpool, but before proceeding to the latter port the ship went back on her course to a port on the east coast of Spain On arriving at Liverpool, the oranges were found to be decayed owing to the delay *Held*, the clause in the bill of lading giving liberty to deviate must not be construed so as to defeat the object of the contract, the deviation was not justifiable and the shipowner was liable in damages

Justifiable deviation.

There are two cases in which deviation is justifiable apart from express contract

(1) For purposes necessary to the prosecution of the voyage or to the safety of the adventure,

(*s*) (1888), 20 Q B D 475 (*t*) (1893), A. C 351

(2) To save life—but not property

To further the adventure

It is the master's duty to do all in his power to ensure the safety of the adventure If the ship sustains such damage that repairs are necessary, he must put into the nearest port even though this involves deviation (*u*) In *Kish* v *Taylor* (*v*) deviation was held justified even though it was necessitated by the ship's unseaworthiness when the voyage commenced In *The Teutonia* (*w*) a German ship bound for Dunkirk deviated to Dover in consequence of a report that war had been declared between France and Germany In fact war was declared three days later *Held*, the deviation was justifiable

To save life

Deviation to save life is always justifiable, but not to save property unless this is expressly stipulated In *Scaramanga* v *Stamp* (*x*) a ship deviated to assist another, but, instead of merely saving the crew, an attempt was made to earn salvage by towing the distressed vessel The relieving ship went ashore and was lost with her cargo *Held*, the shipowner was liable for the loss of the cargo although it was caused by perils of the sea which were excepted by the charter

Effect of deviation

This last case illustrates the effect of deviation upon the contract of carriage The implied undertaking not to deviate is regarded as a vital term in the contract It is a condition, and the effect of a breach of it is to sweep aside the whole of the special contract in the bill of lading or charter party Consequently the shipowner cannot rely upon the exceptions contained therein Thus, in *Thorley* v *Orchis Steamship Co* (*y*) a cargo of beans was shipped for London The bill of lading excepted negli

(*u*) *Phelps* v *Hill* (1891), 1 Q B 605
(*v*) (1912), A C 604
(*w*) (1872), 41 L J Adm 57
(*x*) (1880), 5 C P D 295
(*y*) (1907), 1 K B 660.

gence of stevedores The vessel deviated Subsequently the beans were damaged through the negligence of steve dores *Held*, the shipowner was liable for the damage because, owing to the deviation, he could not rely upon the exception in the bill of lading

Position of shipowner

In this case Fletcher Moulton, L J , after pointing out that deviation changes the essential character of the voyage, said " The most favourable position which he (the shipowner) can claim to occupy is that he has carried the goods as a common carrier for the agreed freight I do not say that in all cases he would be entitled as of right to be treated even as favourably as this " (*z*)

Can he claim the freight and the common law exceptions ?

As to the first part of this dictum, if the whole special contract is swept away by deviation, it does not appear that the shipowner can claim the agreed freight His right would be that of a common carrier to claim a reasonable sum for carrying the goods The second part of the dictum seems to suggest that the shipowner would not be entitled to claim the benefit of the common law excep tions The case of *Leduc* v *Ward* (*supra*) lends some support to this view , for there the shipowner was held liable for a loss which might have come within the common law exception " acts of God " But the case of the *Inter national Guano Co* v *McAndrew* (*a*) makes it clear that the liability of the shipowner in the event of deviation is the same as that of a common carrier This case also decides that the principle of *Thorley* v *Orchis Steamship Co* — where the loss occurred after the deviation—applies also to losses occurring before the deviation

Contrasts deviation and unseaworthi ness

The difference between the effect of deviation and that of unseaworthiness may be seen by contrasting *Thorley* v *Orchis Steamship Co* with *The Europa* (*b*) Where loss is

(*z*) At p 669 (*a*) (1909), 2 K B 360 (*b*) (1908), P 84

actually caused by unseaworthiness, the shipowner is liable, but if the substantial cause of the loss is an excepted peril, he is not liable although the ship was unseaworthy In the case of deviation it is not a question of causation at all If the ship deviates the shipowner is liable for any loss, whether it arose out of the deviation or not and whether it occurred before or after the deviation, subject only to the common law exceptions

In *Kish* v *Taylor* (*c*) the ship was unseaworthy at the time of sailing by reason of an excessive quantity of cargo being stowed on deck She was obliged to deviate because bad weather made repairs necessary *Held*, the deviation was justifiable so as to entitle the shipowner to the benefit of a lien on the cargo for dead freight given by the bills of lading in accordance with the charter party

(*c*) (1912), A C 604

CHAPTER VI

AUTHORITY OF THE MASTER.

Extent of his authority

THE authority of the master of a ship is very large and extends to all acts that are usual and necessary for the employment of the ship (*a*) He may

(1) Make contracts for the hire of the ship, but cannot vary contracts which the owner has made

(2) Enter into agreements to carry goods for freight

(3) Sign bills of lading for goods shipped and acknowledge the quantity and condition of the goods when put on board

(4) Sell the cargo at an intermediate port in order to prevent loss to the cargo owner by keeping it on board when it has become unfit to be carried further

(5) Sacrifice the ship, freight, or cargo to save the whole adventure from a common danger (*b*)

(6) Borrow money in foreign ports for necessary expenses and bind the owners of ship and cargo to repay it For this purpose he may hypothecate ship and cargo as security for the money borrowed (*b*)

Authority to contract for owners

The master usually has authority when in a foreign port to make contracts for carrying goods or hiring the vessel Apart from notice to the contrary, persons so dealing with the master may assume that he is a general agent having authority to bind the owners for the purposes and on the

(*a*) Per Jervis, C J , in *Grant* v *Norway* (1851), 20 L J C P at p 98

(*b*) *See* chap VII

terms on which the vessel is usually employed The master has no power to carry goods freight free (*c*) or to sign bills of lading for a lower rate of freight than the owner has contracted for (*d*) He must not assume "any other authority than the indispensable and necessary one of procuring a freight for the vessel according to the ordinary terms" (*e*) "The authority of the captain to bind his owners by charter party only arises when he is in a foreign port and his owners are not there and there is difficulty in communicating with them" (*f*) In *Lloyd* v *Guibert* (*g*) it was decided that the authority of a master of a foreign ship to contract on behalf of his owners was limited by the law of the ship's flag

The master has no authority to cancel or alter contracts already made by the owners Thus he cannot alter the port of discharge or the amount of the freight But where the other party refuses to perform the original contract the master may make the best arrangement possible for the employment of the ship In *Pearson* v *Goschen* (*h*) the charterers failed after part of the homeward cargo had been loaded Their agents refused to load the rest of the cargo and the master then agreed, under protest, to carry the whole homeward cargo at 30*s* a ton The shipowners claimed freight at 90*s* a ton as originally agreed *Held*, as to the cargo shipped after the failure, the new agreement was valid, but as to that already on board, the original freight of 90*s* a ton was payable

(*c*) Per Jervis, C J, in *Grant* v *Norway* (1851), 20 L J C P at p 98

(*d*) *Pickernell* v *Jauberry* (1862), 3 F & F 217

(*e*) Per Dr Lushington in *The Sir Henry Webb* (1849), 13 Jur 639

(*f*) Per Brett, L J, in *The Fanny, &c* (1883), 48 L T at p 775

(*g*) (1865), 33 L J Q B 241 (*h*) (1864), 33 L J C P 265

The master is presumed to be the servant of the registered owner of the ship On a change of ownership, the master's original authority and instructions are valid until he receives notice of the change (*i*) Although the new owners may not be bound by his contracts, if they recognize his act in receiving goods on board they must accept the terms upon which he received them (*i*)

Master's liability on his contracts

The master often signs bills of lading and charter parties in his own name without words, showing that he is merely acting as agent for the owners In such cases the other party can treat either the master or the shipowner as the person liable on the contract Since the case of *Priestly* v *Fernie* (*j*) it has been quite clear that, as in the case of any other form of agency, judgment against the master is a bar to an action on the same cause against the owners of the ship

The master may himself sue on contracts made in his own name, but not where he acted merely as servant of the owner Thus, where the charter provided that the master should sign bills of lading and these incorporated the terms of the charter party, it was held that he could not sue the charterers for freight His signature to the bills of lading was not a fresh contract but merely a means of carrying out the charter party (*k*)

Admissions in the Bill of Lading —What we have now to consider is the effect of the master's signature to the bill of lading as an admission that the goods therein mentioned were shipped and were in good condition when put on board The shipowner undertakes to deliver all the goods put on board " in like good order and condition " He

(*i*) Per Bramwell, B , in *Mercantile Bank* v *Gladstone* (1868), 37 L J Ex 130

(*j*) (1865), 3 H & C 977

(*k*) *Repetto* v *Millars Karri, &c , Forests* (1901), 2 K B 306

is liable for failure to deliver the full quantity and for any damage to the goods not arising from excepted perils

Evidence against shipowner but not conclusive

Broadly, the rule of law is that statements in the bill of lading as to the quantity, quality, and condition of goods shipped are evidence against the shipowner but are not conclusive The law on this subject may be summarized as follows

Admissions by the master

(1) He is the shipowner's agent to make all admissions ordinarily made in a bill of lading

(2) Where he signs for goods not in fact put on board, the shipowner is not estopped from proving that they were not shipped (*l*)

(3) The onus of proving that goods mentioned in the bill of lading were not shipped is on the shipowner (*m*)

(4) The master's signature only admits

(*a*) The receipt of a certain number of packages, &c He is not required to verify their weight, contents, or value

(*b*) That the goods or packages were externally in good condition He is not required to examine the quality or condition of the goods by opening the packages

The following cases illustrate the propositions stated above

Statements as to quantity

In *McClean and Hope* v *Fleming* (*n*) it was laid down that it is not to be presumed that the master has exceeded his authority, and therefore, until the contrary is proved, it must be assumed that he received the goods signed for Hence the bill of lading is *primâ facie* evidence, both

(*l*) *Grant* v *Norway* (1851), 20 L J C P 93 The contrary rule prevails in most continental countries

(*m*) *Smith* v *Bedouin S N Co* (1896), A C 70

(*n*) (1871), L J 2 H L Sc at p 130

against the master signing and against the shipowner, that the goods have been shipped

In *Grant* v *Norway* (*o*) a bill of lading was signed by the master for twelve bales of silk which had not been put on board It was held that the master had no authority to sign for goods not shipped, and therefore holders of the bill of lading had no claim against the shipowner for non delivery of these bales In another case (*p*) the master had been fraudulently induced to give bills of lading twice over for the cargo, and delivery was obtained under the second set of bills It was held that the shipowner was liable to holders of the original bills

In *Thorman* v *Burt* (*q*), after the mate's receipt had been given for a cargo of timber some of it was lost before ship ment Bills of lading were, nevertheless, given for the whole *Held*, the shipowner was not bound by the state ments in the bills of lading as to the part of the cargo not put on board There may, however, be a stipulation that the quantity stated in the bill of lading shall be conclusive In that case the shipowner is estopped from denying that the goods have been shipped, whether they have or not, unless there has been fraud on the part of the shipper

In *Cox* v *Bruce* (*r*) bales of jute were shipped with marks indicating the quality of the jute The bill of lading wrongly described the bales as bearing other marks indi cating a better quality The holders of the bill of lading claimed the difference in value from the shipowner *Held*, the shipowner was not estopped from denying the state- ment in the bill of lading as to quality It is not the

As to quality

(*o*) (1851), 20 L J C P 93
(*p*) *Hubbersty* v *Ward* (1853), 22 L J Ex 113
(*q*) (1886), 54 L T 349
(*r*) (1886), 56 L J Q B 121

captain's duty to insert quality marks, hence, if he states them incorrectly, this does not prevent the shipowner from showing that goods of that quality were not put on board

As to condition

An admission as to the condition of goods on shipment will bind the shipowner only as to defects which ought to be apparent on reasonable inspection Thus timber although obviously stained with petroleum, was stated in the bill of lading to be "shipped in good order and condition" *Held*, the assignee of the bill of lading could sue the shipowner for damages and the latter was estopped from denying that the timber was shipped in good condition (*s*) This is so even though the mate's receipt contained a remark as to the bad condition of the goods (*t*)

In *The Peter der Grosse* (*u*) it was held that the clause "shipped in good order," &c, in the bill of lading amounted to an admission that the goods were apparently and externally in good condition when put on board, and it was for the shipowner to show that damage to the goods had not arisen on board or was covered by the exceptions in the bill of lading

Where the consignee is also the shipper, statements in the bill of lading as to condition do not bind the shipowner He may show what was in fact the condition of the goods when shipped The mere fact that goods shipped under the usual clause have been delivered in a damaged condition does not suffice to render the shipowner liable to the shipper The latter must show that the damage was due to fault on the part of the shipowner or else that the goods were in fact shipped in good condition (*v*)

(*s*) *Compania Naviera Vasconzada* v *Churchill* (1906), 1 K B 237

(*t*) *Martineaus* v *R M S Packet Co* (1913), 28 T L R 364

(*u*) (1876), 34 L T 749

(*v*) *The Ida* (1875), 32 L T 541

The bill of lading is an admission on the part of the shipowner that certain goods have been shipped apparently in good condition, and an undertaking by him to deliver them in such like condition at the end of the voyage provided—

(1) freight is paid as agreed,

(2) he is not prevented by any of the excepted perils Hence the shipowner is liable for all damage to the goods while on board apart from that caused by excepted perils If some of the goods are not in good order when shipped, a clean bill of lading ought not to be given but a note to that effect should be made in the margin of the bill

Bills of Lading Act, 1855, section 3

The Bills of Lading Act, 1855, section 3, enacts that in the hands of a consignee or endorsee for value the bill of lading is conclusive evidence, as against the person signing it, that the goods represented to have been shipped were actually shipped But this does not apply where

(1) The holder of the bill of lading knew when he took it that the goods had not been shipped

(2) The person signing can show that the misrepresentation was due to the fraud of the shipper, holder of the bill of lading, or some one under whom the holder claims

The person signing will generally be the master or broker Any person who has a discretionary authority to sign bills of lading will be liable under this provision Where a clerk or servant who has no such authority signs, the estoppel will operate against the person on whose behalf he appends the signature

In the case of *Thorman* v *Burt* (*supra*) the master would clearly have been liable under the above provision, but the action was brought against the shipowner The case of *Grant* v *Norway* was prior to the Act

An important case on the construction of section 3 of the

Bills of Lading Act, 1855, is *Parsons* v *New Zealand Shipping Co* (*w*) In that case 608 frozen carcases of lambs were put on board and the bill of lading, signed by the defendants, showed the carcases as marked 622X On arrival only 507 carcases were found to be marked 622X, the remaining 101 being marked 522X The endorsee of the bill of lading argued that the defendants were estopped from denying the statement in the bill of lading and were liable for failing to deliver 101 carcases It was held that the marks did not form part of the description of the goods and no estoppel arose The section protects persons who have acted on a misrepresentation that goods have been shipped when they have not Here the marks were quite immaterial as far as the purchaser was concerned because the lambs marked 522X were of the same character and value as those marked 622X

Authority to act for Cargo owner —In cases of emergency the master may become the agent of the cargo owner to take special measures to preserve the cargo or to minimize the loss arising from damage which has already occurred In cases of necessity he may

(1) Sell the goods at an intermediate port

(2) Jettison part of the cargo to save the rest of the adventure

(3) Incur special expense to preserve the cargo or to transhup and forward it Such expense he can recover from the cargo owner

(4) Hypothecate the goods as security for money raised to ensure their arrival at the port of destination

The master's authority thus to act in the interests of the cargo owner is part of his general authority as servant of the shipowner, and the latter will be liable if the master

(*w*) (1901), 1 Q B. 548

abuses his powers Thus, if the master improperly jettisons goods the shipowner will be liable, for such an act is within the scope of his functions as servant of the shipowner But the master has no authority to act for the cargo owner if the latter or his representative can be communicated with (*x*) If this can be done, he must obtain instructions from the owner of the goods and must obey them (*y*) Where charterer and shipowner agreed on instructions which were ambiguous and were misinterpreted in good faith by the master, it was held that the charterer could not hold the shipowner liable (*z*)

Power to sell the cargo

When, from the effects of inherent vice or otherwise, the goods are damaged on the voyage so that their value is rapidly deteriorating and it would be impossible or highly imprudent to carry them to their destination, the master has power to sell them at an intermediate port In so doing he must have regard solely to the interests of the cargo owner, and he must not effect a sale unless there is a real necessity for it In *Cannan* v *Meaburn* (*a*) the ship was leaking very badly and the master was of opinion that she was not worth repairing Accordingly ship and cargo were sold at a port of refuge It was held that the sale of the cargo was not justified as the ship might have been repaired or the goods transhipped and forwarded by another vessel

Purchasers of a cargo from the master of a ship do not get a good title "unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination, and that he could not by any means available to him carry the goods, or procure the goods to

(*x*) Cargo ex Argos (1873), 42 L J Adm at p 56
(*y*) *Acatos* v *Burns* (1878), 47 L J Ex 566
(*z*) *Miles* v *Haslehurst* (1907), 12 Com Ca 83
(*a*) (1823), 2 L J C P 60

be carried, to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination" (*b*)

The fundamental rule that the master's authority to act for the cargo owner arises from necessity and cannot be exercised if the cargo owner can be communicated with is applied here with strictness In *Acatos* v *Burns* (*c*) a cargo of maize which had become heated was sold at an intermediate port The jury found that it was impossible to carry the cargo to its destination and that a sale was prudent under the circumstances, but that the necessity for a sale was not so urgent as to prevent communication with the cargo owners *Held*, the shipowner was liable to the cargo owner for selling without his consent Baggallay, L J , said "In order to justify the sale under the circumstances, there must be not only an absolute necessity but an inability to communicate with the owner of the cargo" (*d*)

(*b*) *Atlantic Mutual Insurance Co* v *Huth* (1880), 16 Ch D at p 481
(*c*) (1878), 47 L J Ex 566
(*d*) At p 568

CHAPTER VII

GENERAL AVERAGE AND BOTTOMRY

What is a general average sacrifice

WHERE in the course of the voyage a danger arises which makes it necessary to sacrifice the ship or cargo, the loss will generally fall upon the owner of the particular interest sacrificed Thus if, owing to heating, it becomes necessary to sell the cargo at an intermediate port, the cargo owner will have to bear the loss arising from such a sale The same principle applies to extraordinary expenditure during the voyage If, owing to bad weather, the ship has to put in for repairs, the expense of such repairs must be borne by the shipowner

But where ship and cargo are exposed to a common danger and some part of the cargo or of the ship is intentionally sacrificed, or extra expenditure is incurred, to avert that danger, such loss or expense will be the subject of general average contribution It will be apportioned between ship and cargo in proportion to their saved values This is a very ancient rule of maritime law It found its way from the law of Rhodes into the Digest of Justinian, and through the usage of commerce it has become a part of the common law of England

Conditions of contribution

For a sacrifice to be the subject of general average contribution, the following conditions must obtain

(1) There must be a danger common to the whole adventure

(2) The sacrifice must be real, intentional, and necessary

(3) The danger must not arise from the fault of the person claiming

Common danger

There must be a common danger In *Nesbitt* v *Lushington* (*a*) a ship was stranded on the coast of Ireland during a period of great scarcity The inhabitants compelled the captain to sell wheat, which was on board, at less than its value As they intended no injury to the vessel, there was no common danger and it was held that this was not a general average loss But the danger need not be common to the whole adventure in the sense that the discharge of a large part of the cargo would preclude the possibility of a general average loss Thus where most of the cargo having been discharged, a fire broke out on the ship, and the remainder of the cargo was damaged by water used in putting out the fire, it was held that the shipowner must contribute in respect of this damage (*b*)

Real sacrifice

Where the thing abandoned is already practically lost, there is no real sacrifice and consequently no claim for contribution, *e g*, cutting away a mast which is already virtually a wreck (*c*) But where deck cargo had broken loose in a storm so that it was a source of danger, and interfered with the working of the pumps, it was held that the cargo was not virtually lost and its jettison amounted to a sacrifice (*d*)

Generally the duty of deciding whether a sacrifice is necessary, rests with the master of the ship But it appears that the act of an independent authority may give rise to a claim for general average contribution provided it was done solely in the interest of the ship and cargo (*e*)

(*a*) (1792), 4 T R 783
(*b*) *Whitecross Wire Co* v *Savill* (1882), 51 L J Q B 426
(*c*) *Shepherd* v *Kottgen* (1877), 47 L J C P 67
(*d*) *Johnson* v *Chapman* (1865), 35 L J C P 23
(*e*) *Papayanni* v. *Grampian Steamship Co* (1896), 1 Com Ca 448

Where the loss or expenditure has been caused by fault on the part of one of the interests involved, that interest is precluded from claiming general average contribution Thus the shipowner cannot recover in respect of extra expenditure to further the adventure where such expenditure was due to the ship's unseaworthiness (*f*) But suppose goods have been jettisoned to avert a common danger caused by negligent navigation can the owners of those goods claim against the owners of the rest of the cargo? It was decided in *Strang* v *Scott* (*g*) that they could The owners of the jettisoned goods "were not privy to the master's fault and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods for the sake of others to avert the consequences of his fault" (*h*)

Fault of person claiming

Where the contract of carriage makes certain exceptions to the liability which would otherwise fall on one of the parties, it prevents the grounds of such liability being imputed as a fault to the party in whose favour the exceptions are made Hence, if negligence of the ship owner is excepted in the contract, he can recover in respect of loss or expense incurred for the common good even though his negligence made the loss or expense necessary In *The Carron Park* (*i*) the charter party excepted negligence of the shipowner's servants By reason of negligence on the part of the ship's engineers, water got into the ship and the shipowner claimed against the cargo owner in respect of expenditure necessary to remove it *Held*, he was entitled to contribution from the cargo owner

Effect of exceptions

In order to prevent a person recovering general average contribution on the ground that he was in fault, the fault

(*f*) *Schloss* v *Heriot* (1863), 32 L J C P 211
(*g*) (1889), 14 A C 601
(*h*) *Ibid* Per Lord Watson at p 609
(*i*) (1890), 59 L J Adm 74

must be something which constitutes an actionable wrong (*j*) Where during the voyage, a cargo of coal took fire by spontaneous combustion, the cargo owner was held entitled to contribution from the shipowner in respect of damage to the coal in extinguishing the fire There had been no negligence on the part of the shippers, and it was assumed that both parties were equally familiar with the liability of coal to spontaneous combustion in a climate like that of India (*k*)

General average loss

There are three interests involved in a maritime venture —the cargo, the ship, and the freight Consequently general average loss may arise from

(1) Sacrifice of cargo

(2) Sacrifice of the ship or tackle

(3) Sacrifice of freight

Jettison

The commonest instance of a general average sacrifice is jettison This consists in throwing overboard cargo or stores in order to lighten the vessel There must be a voluntary act of sacrifice in the interests of the whole adventure The mere washing overboard of part of the cargo will not give rise to general average contribution nor will the throwing overboard of cargo by the crew or passengers out of private malice (*l*)

Deck cargo

To give rise to a general average contribution, the cargo jettisoned must have been stowed in a proper place Generally it is not proper to stow cargo on deck, and, in the absence of a special custom or the consent of the other interests in the adventure, the owner of deck cargo has no claim for general average contribution if it is jettisoned (*m*) If the shipowner has agreed to receive

(*j*) *Greenshields, Cowie & Co* v *Stephens* (1908), 1 K B at p 61
(*k*) *Ibid* (1908), A C 431
(*l*) "Abbott on Shipping" 14th edition, p 753
(*m*) *Strang* v *Scott* (1889), 14 A C at p 608

deck cargo, the ship and freight must contribute to the loss, provided the owner of the jettisoned goods is the sole cargo owner But where there are other cargo owners who have not consented to the stowing on deck, no contribution can be obtained from them or from the ship owner (*n*)

It is sometimes stipulated that the cargo shall be carried "at merchant's risk" This frees the shipowner from liability for improper jettison by his servants But where the master properly jettisons goods, he is acting as agent for the cargo owner and the above proviso does not apply Where the goods are stowed on deck without the shipper's consent, the shipowner would be responsible for their loss by jettison because he has placed them in a dangerous position in violation of his undertaking to carry them safely (*o*) But a valid custom to stow such goods on deck would relieve him of liability

Sacrifice of ship or tackle

Where any sacrifice of the ship, her stores or tackle is necessary to avert a common danger, it will be the subject of general average contribution unless it was incurred in fulfilling the shipowner's original contract to carry the goods safely to their destination All ordinary losses sustained by the ship must be borne by the shipowner but sacrifices to meet the particular emergency, such as loss of the ship's tackle through using it for unusual purposes in order to secure her safety in specially difficult circumstances, will be the subject of general average contribution (*p*) Similarly where spare spars were cut up for fuel to keep a pump going, their value was held to be the subject of contribution because this was not the use they were in

(*n*) *Wright* v *Marwood* (1881), 7 Q B D at p 69
(*o*) *Royal Exchange Co* v *Dixon* (1886), 12 A C 11
(*p*) *Birkley* v *Presgrave* (1801), 1 East 220

tended for and the ship would have gone down if the pumping had not been maintained (*q*) Where the tackle is insufficient for the ordinary needs of the ship, the shipowner cannot claim in respect of things destroyed to make up the deficiency

Stranding

Where the ship is in danger of sinking, and the master deliberately runs her ashore for the purpose of saving the cargo and possibly also the ship, the loss of or damage to the ship would probably be held to be a general average sacrifice (*r*) The difficulty in so holding, lies in the fact that if the ship is practically certain to go down, there in no sacrifice in stranding her This is the principle laid down in *Shepherd* v *Kottgen* (*supra*) Still, the policy of our Courts is to encourage the master to act impartially in the interest of all concerned and to hold otherwise would be to encourage him to hazard ship and cargo in preference to incurring certain damage to the ship by strand ing her to save the cargo "It would defeat the main utility of general average if at a moment of emergency, the captain's mind were to hesitate as to saving the adventure through fear of casting a burden on his owners" (*s*)

Sacrifice of freight

Where freight is payable on delivery, a jettison of the goods involves not only a sacrifice of the goods themselves but also a loss of the freight on them Accordingly the person to whom the freight would have been payable, whether charterer or shipowner, is entitled to claim contribution from the owners of the interests saved In *Pirie* v *Middle Dock Co* (*t*) cargo damaged by a general

(*q*) *Harrison* v *Bank of Australasia* (1872), 41 L J Ex 36

(*r*) *See* the judgment of Brett, L J , in *Whitecross Wire Co* v *Savill* (1882), 8 Q B D at p 662

(*s*) Per Grove, J , in *Shepherd* v *Kottgen* (1877), 47 L J C P at p 69

(*t*) (1881), 44 L T 426

average sacrifice had to be discharged at an intermediate port It was held that a general average contribution was due from the cargo owner in respect of the freight thus lost

But where freight is payable in advance, it does not depend upon the safe arrival of the goods, and a claim to general average contribution in respect of freight cannot arise

General average expenditure

Where extraordinary expenditure is incurred for the purpose of avoiding a common danger which threatens ship and cargo, such expenditure is the subject of general average contribution in the same way as a loss voluntarily incurred by a sacrifice of the ship, cargo, or freight At the same time it must be borne in mind that the shipowner is under an obligation to defray such expense as may be necessary to complete the voyage It is sometimes difficult to determine whether expenditure is the subject of general average contribution or has been incurred merely in fulfilment of the contractual obligation of the shipowner

Salvage

Payments for salvage services may or may not be general average expenditure Such payments are due to persons other than the carrier who in time of danger render assistance to the vessel The liability to pay salvage, attaches to the property saved in proportion to its value in the same way as general average claims attach Where expense is incurred in saving both ship and cargo, as in refloating a ship that has sunk or got aground with her cargo, this is treated as a general average expense (*u*) But where the cargo has been safely discharged and further operations are directed to getting the ship afloat and towing her into a port for repairs, the further expense thus incurred will fall on the shipowner alone (*v*)

(*u*) *Kemp* v *Halliday* (1866), 34 L J Q B 233
(*v*) *Job* v *Langton* (1856), 26 L J Q B 97

Port of refuge expenses

When a ship puts in to a port of refuge to repair damage done by a general average sacrifice, the cost of repairing the ship, together with other charges incidental thereto, is the subject of general average (*w*) Such incidental charges would include the cost of reloading the cargo if it had to be unloaded in order to effect the repairs But this is not the case where the damage to be repaired arose in the ordinary course of the voyage In *Svendsen* v *Wallace* (*x*), the ship sprung a leak under no special stress of weather beyond the ordinary perils of the sea Acting for the safety of the whole adventure, the master put into a port of refuge for repairs It was necessary to unload the cargo in order to effect the repairs *Held*, the cargo owners were not chargeable with general average contribution in respect of the expense of reloading the cargo This differs from the previous case in that the repairs were necessitated by a general average sacrifice in the one, whereas in the other they arose merely from an ordinary incident of the voyage

Where by reason of an impending peril it has become unsafe for ship and cargo to continue the voyage, deviation to a port of refuge is a general average act But if the deviation was rendered necessary by the unseaworthiness of the ship, the shipowner cannot recover general average contributions in respect of the port of refuge expenses (*y*)

Lien for general average contributions

The shipowner has a lien on the cargo for general average contributions As regards other persons entitled, he is under a duty to retain the goods until any contributions due to them are paid (*z*) In *Crooks* v *Allan* (*a*) the ship-

(*w*) *Atwood* v *Sellar* (1880), 5 Q B D 286
(*x*) (1885), 10 A C 404
(*y*) *Schloss* v *Heriot* (1863), 32 L J C P 211
(*z*) *Strang* v *Scott* (1889), 14 A C at p 606
(*a*) (1879), 49 L J Q B 201

owner failed to take steps to obtain payment of general average contributions, and the persons entitled to such contributions recovered damages from him In practice, however, the goods are usually given up on an undertaking to pay general average claims due on them, or on a deposit being made as security pending the adjustment of general average claims Unless the contract contains a special provision to the contrary, such adjustment is made at the port of delivery and in accordance with the law of that place (*b*)

The lien for general average contributions is a possessory lien, *i e*, a mere right to retain the goods until the contributions are paid The lien can be exercised only by the shipowner, not by anyone entitled to a general average contribution

Bottomry and Respondentia—Where it is necessary to raise money for purposes essential to the prosecution of the voyage, *e g*, to pay for repairs, the master has power to do so by hypothecating the ship and cargo as security for the loan But the master has no authority to charge the cargo for such an advance unless the interests of the cargo owner require it and the ship and freight are an insufficient security for the sum required (*c*)

Where both ship and cargo are given as security, the contract is embodied in a bottomry bond, where only the cargo is hypothecated, a respondentia bond is given The charge created by a bottomry bond becomes payable only in the event of the ship's safe arrival If the ship is lost, the loan is not recoverable In the case of a respondentia bond, the lender takes the same risk with regard to the safe arrival of the cargo

(*b*) *Simonds* v *White* (1824), 2 B & C 805
(*c*) *The Onward* (1873), 42 L J Adm 61

The authority of the master to hypothecate the ship and cargo is a general rule of maritime law "It arises from the necessity of things, it arises from the obligation of the shipowner and the master to carry the goods from one country to another, and from it being inevitable from the nature of things that the ship and cargo may at some time or other be in a strange port where the captain may be without means, and where the shipowner may have no credit because he is not known there, that, for the safety of all concerned and for the carrying out of the ultimate object of the whole adventure, there must be a power in the master not only to hypothecate the ship but the cargo" (*d*)

Effect of a bottomry bond

A bottomry bond confers upon the person advancing money under it a maritime lien on the ship, freight and cargo A maritime lien is a privileged claim upon a thing in respect of service done to it (*e*) It is enforced by proceedings in rem taken in the Admiralty Court, which will, if necessary, order the property charged to be sold A maritime lien is distinguished from an ordinary possessory lien (*e g*, the lien for freight) in that it attaches to the property into whosesoever hands the property has passed

The cargo cannot be resorted to in satisfaction of a bottomry bond unless the ship and freight are insufficient to satisfy the charge If it was unnecessary to charge the cargo at all, the bottomry bond will be invalid as against the cargo owner Where expenditure is incurred for repairs to the ship of a more extensive character than were necessary, the bond will be valid against the cargo

(*d*) Per Brett, L J, in *The Gaetano and Maria* (1882), 7 P D at p 145

(*e*) *The Ripon City* (1897), P 226

only to the extent to which such repairs were necessary for the purposes of the voyage (*f*)

The purpose of a bottomry bond is to enable the ship to complete the voyage If she does not arrive at her destination, the lender loses his money Consequently where several bonds have been given, a later bond takes priority over an earlier one The later bond is given at a time of necessity when the earlier one would otherwise be frustrated, and the later is therefore entitled to be satisfied before the bond of earlier date

(*f*) *The Onward* (1873), 42 L J Adm at p 70

CHAPTER VIII

DELIVERY

Place of delivery

In the case of a general ship the port of discharge is stated in the bill of lading, but where the ship is chartered by one merchant three cases arise in connexion with the port of delivery which must be carefully distinguished

(1) Where the port is agreed on and named in the charter party Here, unless limited by other clauses, the obligation to go to the port named is absolute

(2) Where the port is not named in the charter party In this case the charterer must name a safe port, and the obligation is the same whether an express provision to that effect is inserted or not If the charterer names a port which is not safe, the shipowner is discharged from liability to unload there, he can earn the freight by delivering at the nearest safe port

(3) But once the port has been named and accepted by, or on behalf of the shipowner (*e g*, by the master in signing bills of lading), he cannot afterwards refuse to go there on the ground that it is not safe He can, however, claim damages for injury to the ship by reason of the port not being safe

Naming the port Obligation to name a safe port

The charterer very often reserves the right to name the port of delivery at a later stage, sometimes on loading, sometimes when the ship arrives at an intermediate port of call If the ship is delayed by reason of the charterer's default in not naming a port, he will be liable in damages

And if by refusing to name a place of discharge he prevents the shipowner from earning the freight, he will have to pay it as damages for breach of contract (*a*)

The port specified by the charterer must be safe From the decided cases it appears that for this purpose a safe port means any place which is safe enough to enable ships to load and unload there by taking reasonable precautions (*b*) It must be safe for the particular vessel carrying the cargo she has on board And it must be politically as well as physically safe In the case we are considering, the shipowner is not bound to risk confiscation by entering a port which has been declared closed (*c*) If the ship with all her cargo cannot safely get into the place named, the shipowner is entitled to unload at the nearest safe place He is not bound by a custom to unload partly outside and partly inside the port (*d*)

"Safely got"

The clause "Or so near thereto as she may safely get" is often added after the name of the port of discharge Its effect is to limit what would otherwise be an absolute obligation on the shipowner to enter the port named in spite of sand, bars, ice, blockade, &c The clause is also used even where the port is not named in the charter party

Where such a clause is inserted after the name of the port of loading, it refers to the vessel's exit as well as to her entry Hence under such a clause the shipowner is not bound to send his ship to a place which she could reach empty, but could not safely leave when laden

The clause relates only to obstacles which are regarded as permanent, not to such as were contemplated as ordinary

(*a*) *Stewart* v *Rogerson* (1871), I R 6 C P 424
(*b*) *Smith* v *Dart* (1884), 54 L J Q B 121
(*c*) *Ogden* v *Graham* (1861) 31 I J Q B 26
(*d*) *The Alhambra* (1881), 50 L J Adm 36

incidents of the voyage A temporary obstacle, such as an unfavourable state of the tide or insufficient water to enable the ship to get into dock, will not make the place unsafe so as to discharge the shipowner from liability to unload there, unless the terms of the contract indicate otherwise (*e*) Ordinarily the ship must wait until a temporary obstacle is removed, but the master is not bound to wait an unreasonable time Thus in *Dahl* v *Nelson* (*f*) it was held that the voyage was not performed merely by bringing the goods to the entrance of the named dock, which was so crowded that the vessel could not get in for an indefinite period Nevertheless, the charterer having refused to name another place of discharge, it was held that the shipowner was not bound to wait an unreasonable time in order to get into the dock

In *Metcalfe* v *Britannia Ironworks Co* (*g*) delivery was to be made at Taganrog, on the Sea of Azof In December, when the vessel arrived, the Sea of Azof was closed by ice and would not be open for five months It was held that the shipowner was not entitled to freight by delivering as near as he could get The question whether an obstacle is temporary or permanent is not so much one of length of time as of what may be regarded as contemplated incidents of the voyage In the latter case, that the Sea of Azof should be frozen at that time of the year was regarded as reasonably within the contemplation of the parties In *Dahl* v *Nelson*, Lord Blackburn commenting on *Metcalfe* v *Britannia Ironworks Co* says, "It was both reasonable and customary to unload ships in that part of the river to which the vessel had come" (*h*)

(*e*) *Allen* v *Coltart* (1883), 52 L J Q B 686
(*f*) (1881), 6 A C 38
(*g*) (1877), 46 L J Q B 443
(*h*) (1881), 6 A C at p 51

Sometimes the words "always afloat" are added to the above clause Many modern ships would be injured by taking the ground, and these words serve to limit the shipowner's obligation Thus where the bill of lading contained these words, and the ship could not discharge at the port named without taking the ground, it was held that the master was entitled to unload at the nearest safe place (*i*) "Always afloat"

When the ship has arrived at the place of discharge, the consignee or endorsee of the bill of lading must take steps to receive the goods In the absence of a custom or special contract to the contrary, the shipowner is not bound to notify the consignees that he is ready to unload (*j*) It is the duty of the holders of the bills of lading to look out for the arrival of the ship The reason for this rule is that the bills of lading may have been assigned during the voyage, and the master may not know who is entitled to the goods But where the consignees' ignorance of the ship's arrival is due to some default on the part of the shipowner, such as entering the ship at the custom house under a wrong or misleading name, they will not be liable for delay occasioned thereby (*k*) Notice of arrival unnecessary

Unless otherwise agreed, the consignee must take the goods from alongside The shipowner is only bound to deliver over the ship's side In *Peterson* v *Freebody* (*l*) a cargo of spars was to be discharged "overside into lighters" The consignees provided lighters at the ship's side, but did not employ sufficient men in the lighters to take delivery within the time fixed for unloading The What amounts to delivery

(*i*) *Treglia* v *Smith's Timber Co* (1896), 1 Com Ca 360
(*j*) *Harman* v *Mant* (1815), 4 Camp 161
(*k*) *Bradley* v *Goddard* (1863), 3 F & F 658
(*l*) (1895), 65 L J Q B 12

shipowner sued for damages in respect of the delay It was held that the shipowner was not bound to put the spars on board the lighters His duty was simply to put them over the rail of the ship and within reach of the men on board the lighters Consequently the consignee was liable for the delay in unloading

To whom must delivery be made

The goods must be handed over to the consignee or his agents In *Gatliffe* v *Bourne* (*m*) goods were consigned under a bill of lading to the plaintiff or his assigns They were discharged at a wharf on the day after the ship's arrival The consignees were not aware of the ship's arrival, and they were not at the wharf to take delivery Within twenty four hours of the discharge the goods were accidentally destroyed by fire *Held*, the shipowner was liable for their value A reasonable time must be allowed for claiming the goods, and, until that time has elapsed, the shipowner's liability as a carrier continues

But where the custom of the port of delivery recognizes another mode of delivery, personal delivery is not neces sary (*n*) Thus delivery to a dock company, where it is usual for the dock company to take cargo and store it until claimed, has been held sufficient (*o*) And where the regulations of the port required the consignee to employ harbour porters to receive cargo, delivery to them was held sufficient to excuse the shipowner from liability for damage subsequently accruing to the goods (*p*) In *Gatliffe* v *Bourne* (*supra*) the jury found that delivery at the wharf was not sufficient according to the custom of the port

(*m*) (1838), 7 L J C P 172
(*n*) *Petrocochino* v *Bott* (1874) 43 L J C P 214
(*o*) *Grange* v *Taylor* (1904), 20 T L R 386
(*p*) *Knight Steamship Co* v *Fleming* (1898), 25 Sess Ca , 4th series, 1070

The shipowner may also be excused by statute or by express contract from his liability to make personal delivery In *The Chartered Bank of India* v *British India S N Co* (*q*) power was reserved to the shipowner to land and store the goods at the risk and expense of the consignee By the bill of lading the shipowner's liability was to cease as soon as the goods were free of the ship's tackle Persons employed to land the goods, fraudulently delivered them without presentation of the bill of lading *Held*, the shipowner was relieved of responsibility by the above provision in the bill of lading

What goods must be delivered

The delivery must be not only to the proper person but also of the goods consigned to him In *Sandeman* v *Tyzack* (*r*) bales of jute were consigned to various persons The bills of lading provided that the number of packages signed for should be binding on the shipowner The bales were specifically marked, but the shipowner was exempted from liability for obliteration or absence of marks When the cargo was unloaded, fourteen bales were missing and eleven others could not be identified as belonging to any particular consignment All but four of the consignees received the full number of bales, and the shipowner claimed to apportion the eleven bales among these four It was held that, as the shipowner had failed to deliver the full number of bales shipped, he was not entitled to claim the benefit of the exemption as to obliteration of marks, and he was liable for the full value of the missing bales and of those which could not be identified

Production of bill of lading

The master is justified in delivering to the consignee named in the bill of lading (on production thereof), or to the first person who presents a properly endorsed bill of lading provided the master has no notice of dealings with

(*q*) (1909), A C 369 (*r*) (1913), A C 680

other bills of the same set The leading case on this point is *Glyn* v *East and West India Dock Co* (*s*) There goods were deliverable to Cottam and Co, or assigns They deposited one bill of lading with the plaintiffs as security for a loan, and with a second bill they obtained delivery from the Dock Company The plaintiffs sued the Dock Company for wrongful delivery, but it was held that they were entitled to deliver on presentation of a proper bill of lading

Conversely, the master is not justified in delivering to any person who does not produce the bill of lading In *The Stettin* (*t*) barrels of oil were shipped under bills of lading making them deliverable to Mendelsohn or assigns The shipper retained one bill of lading and sent the other to his agents to secure payment of the price The master of the ship delivered the oil to Mendelsohn without production of the bill of lading *Held*, the shipowner was liable to the shipper for so delivering

If the master has notice of other claims to the goods, he delivers at his peril His proper course is to inter plead (*u*) In practice, however, he usually delivers to one party on tender of an indemnity against the consequences should it turn out that another person was entitled to the goods

Power to warehouse the goods

At common law the master is not bound to keep goods on board his ship for an unreasonable time in the event of the holder of the bill of lading not claiming them He may warehouse the goods at owner's expense, and is bound to do so if keeping them on board would render persons who are not in fault liable for demurrage (*v*)

(*s*) (1882), 7 A C 591 (*t*) (1889), 14 P D 144
(*u*) *Glyn* v *East and West India Dock Co* (1882), 7 A C at p 611
(*v*) *Erichsen* v *Barkworth* (1858), 3 H & N 601

The shipowner has also a statutory power to warehouse goods not claimed By the Merchant Shipping Act, 1894, Part VII section 493, where the owner of goods imported into the United Kingdom fails to make entry thereof at the custom house, or having made entry fails to take delivery, the shipowner may warehouse the goods

(1) at any time after that fixed for delivery in the bill of lading or charter party, or, if none is fixed,

(2) after the expiration of three working days from the time when the master reports the ship at the custom house

The power conferred by the above Act may be excluded by express agreement or by the custom of the port (*w*) Most bills of lading now contain a clause authorizing the shipowner to unload the goods immediately on arrival, and stipulating that the shipowner's responsibility is to cease when the goods have been landed

Shipowner's responsibility ceases

The shipowner continues liable as a carrier until by the contract, or in the usual course of business, the transit is terminated and the goods have been warehoused for their owner until he is ready to receive them (*x*) The mere fact that the goods have reached their destination is not enough to discharge the shipowner This is clear from *Gatliffe* v *Bourne* (*supra*) where he was held liable for an accidental loss by fire after the goods had been landed The carrier may limit his liability to that of a bailee by giving notice that he has warehoused the goods and will no longer be responsible for their safe custody, provided the consignee accepts such notice (*y*) The consignee's refusal to take delivery or failure to do so within a reason

(*w*) Isle v *Stumore* (1881), 1 C & E 319

(*x*) *Re Webb* (1818), 8 Taun 443

(*y*) *Mitchell* v *Lancashire and Yorkshire Railway Co* (1875), 44 L J Q B 107

able time (*z*), also puts an end to the shipowner's liability as a carrier

When the shipowner has warehoused the goods under the Merchant Shipping Act (*supra*) he is no longer responsible for their safety The warehouseman is not an agent for the shipowner for the purpose of ensuring the safety of the goods He is under an obligation "to deliver the goods to the same person as the shipowner was by his contract bound to deliver them, and is justified or excused by the same circumstances as would justify or excuse the master" (*a*)

Lay days

Demurrage—The earning power of a ship depends upon her continuous employment with as little delay as possible beyond the time occupied by the voyage The charter party generally specifies a certain number of days, called lay days, within which the ship is to be loaded and discharged Provision is also usually made for extra days at a specified rate of payment, and this payment is called demurrage

Damages for detention

Where no definite period of lay days is fixed, the charterer is bound to load and unload the ship within a reasonable time This obligation is a much less stringent one than where a definite time is agreed on, because it allows the circumstances of the case to be taken into consideration Thus in *Hick* v *Raymond* (*b*) no time was fixed for the unloading which was delayed owing to a strike of dock labourers It was decided that the shipowners were not entitled to damages for detention of the ship Any excess

(*z*) *Chapman* v *Great Western Railway Co* (1880), 49 L J Q B 420

(*a*) Per Lord Blackburn in *Glyn* v *East and West India Dock Co* (1882), 7 A C at p 614 The dictum refers to the Merchant Shipping Act, 1862, section 66, but applies to the later Act

(*b*) (1893), A C 22

beyond a reasonable time, or beyond the demurrage days agreed on, gives rise to a claim for unliquidated damages *Primâ facie* the measure of such damages is the rate agreed on for demurrage, if any, but it is open to either party to show that this is not a correct measure of the loss actually sustained (*c*)

Where the time for loading and unloading is specified, the charterer is under an absolute obligation to complete those operations within that time It is no defence that through no fault of his own it was impossible to finish the work in the agreed time Thus in *Budgett* v *Binnington* (*d*) the time fixed for unloading was exceeded in consequence of a strike of dock labourers It was held that the ship owners were entitled to demurrage Contrast this case with *Hick* v *Raymond* (*supra*) in which no time was fixed It illustrates the fact that where a definite time is agreed on the obligation is an absolute one, and failure to load or unload within that time can only be excused by some thing amounting to default on the part of the shipowner, *e g*, obstructing the unloading (*e*)

In *Thies* v *Byers* (*f*) bad weather prevented the master from discharging the cargo in the usual way Nevertheless the charterers were held liable for exceeding the agreed time In *Houlder* v *Weir* (*g*), during the course of unloading it was necessary to take in ballast to keep the ship upright This caused the agreed time for discharge to be exceeded It was held that taking in ballast could not be regarded as a default on the part of the shipowner, and the charterers were therefore liable for the delay If in the proper exercise of a lien on the goods the shipowner

(*c*) *Moorsom* v *Bell* (1811), 2 Camp 616
(*d*) (1891), 1 Q B 35
(*e*) *Benson* v *Blunt* (1841), 10 L J Q B 333
(*f*) (1877), 1 Q B D 244 (*g*) (1905), 2 K B 267

detains the ship beyond the lay days, he can nevertheless recover damages for the detention (*h*)

Unless caused by shipowner's default

In practice, the actual loading and unloading are generally done by servants of the shipowner, and he must do all he reasonably can to complete the work in the agreed time In *Hansen* v *Donaldson* (*i*) the crew was insufficient to unload in the stipulated time *Held*, the charterer was not liable for the delay thus caused, the shipowner ought to have employed extra men From the judgment of Vaughan Williams J, in *Budgett* v *Binnington* (*j*), it would appear that the charterer ought himself to have employed extra men to avoid incurring liability for demurrage

Quarantine

It should be noted that lay days do not begin to run until the ship is actually ready to receive or discharge cargo Hence the charterer is not liable for delay where the ship, in common with all other vessels coming from a prescribed area, has to go into quarantine on her arrival at the port of loading (*k*) or discharge But if at the port of discharge the ship comes within quarantine regulations on account of the cargo she is carrying, presumably the charterer would be liable At any rate he is liable for delay in obtaining the necessary custom house papers for discharging only when the delay arises from the fact that special papers are required for the particular cargo carried (*l*)

Incorporation of Charter in Bill of Lading

If it is desired to make shippers or consignees, who are not parties to the charter, liable for demurrage agreed on in the charter party, there must be a clear stipulation to

(*h*) *Lyle* v *Cardiff Corporation* (1899), 5 Com Ca 87
(*i*) (1874), 1 Sess Ca (4th) 1066
(*j*) (1891), 25 Q B D at p 327
(*k*) *White* v *Wenchester Steamship Co* (1886), 23 Sc L R 342
(*l*) *Hill* v *Idle* (1815), 4 Camp 327

that effect in the bill of lading The stipulation usually takes the form "freight and all other conditions as per charter" But this clause will not incorporate provisions which are inconsistent with the bill of lading or which do not affect the consignee's right to take delivery Thus where the bill of lading specifies an amount to be paid as freight, this cannot be altered by a general reference to the charter such as the clause set out above On the other hand, such a clause would be sufficient to make the consignee in the bill of lading liable for charter-party demurrage (*m*)

(*m*) *See* the judgment of Brett, M P , in *Gardner* v *Trechmann* (1885), 15 Q B D at p 157

CHAPTER IX

FREIGHT

Payable on delivery

FREIGHT is the consideration paid to the shipowner for the carriage of goods in his ship Generally it is payable upon delivery of the goods, and it is then a condition precedent of the shipowner's right to recover freight that he should have delivered or been ready to deliver the goods "The true test of the right to freight, is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed, and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant" (*a*)

Where a period is fixed during which the consignee is to take delivery, the shipowner must be ready to deliver throughout that period In *Duthie* v *Hilton* (*b*) freight was payable within three days after the arrival of the ship and before delivery of any portion of the goods Owing to fire, the ship was scuttled on the night after her arrival and the goods were destroyed *Held,* freight was not payable because the shipowner had not continued ready to deliver during the whole of the period allowed If no period is agreed on, a reasonable time for taking delivery must be allowed

Payment of freight and delivery of the goods are, unless otherwise agreed, concurrent conditions The consignee

(*a*) Per Willes, J , in *Dakin* v *Oxley* (1864), 10 L T at p 270
(*b*) (1868), 19 L T 285

must, if required, pay the freight on the goods as they are delivered (*c*)

It is no defence to a claim for freight to show that the goods are damaged The shipowner is entitled to full freight if he is ready to deliver at the port of destination the goods loaded The freighter cannot deduct from the freight for damage to the goods, but will have a separate cause of action for it unless it was caused solely by excepted perils or inherent vice In *Dakin* v *Oxley* (*d*) coal shipped under a charter was, through the negligence of the master, so deteriorated as not to be worth its freight The charterer, therefore, abandoned it to the shipowner *Held*, he was nevertheless liable for freight, his remedy for damage to the coal being by cross action

Goods must be substantially those shipped

But freight will not be payable unless the goods are delivered in such a condition, that they are substantially and in a mercantile sense the same goods as those shipped Thus in *Asfar* v *Blundell* (*e*) a ship carrying dates was sunk in the Thames The dates were recovered, but in a state which rendered them unfit for human food They were sold for distilling purposes *Held*, no freight was payable because the goods delivered were, for business purposes, something different from those shipped

Voyage must be completed

Unless the shipowner carries the goods to the destination agreed on, he is not entitled to any part of the freight If the goods are lost on the way, no matter how, no freight is earned The excepted perils afford the shipowner a good excuse for non delivery of the goods, but he cannot earn freight by virtue of one of them If the ship cannot finish the voyage, the shipowner must forward the goods

(*c*) *Moller* v *Young* (1855), 24 L J Q B 217
(*d*) (1864), 10 L T 268
(*e*) (1895), 65 L J Q B 138

by some other means or his claim to freight is lost (*f*)

In *Hunter* v *Prinsep* (*g*) the voyage was from Honduras to London Freight was payable on right and true delivery of the cargo, and the excepted perils were dangers of the seas After being captured by the enemy, the vessel was recaptured and recommenced the voyage, but owing to bad weather she was driven ashore at St Kitts The wreck and cargo were put up for sale without the consent of the cargo owner After paying claims for salvage, the master claimed to retain the balance of the proceeds of sale for freight *Held*, although the ship was prevented by excepted perils from completing the voyage, no freight was payable It should be observed, that had the cargo been lost by excepted perils, no action would have lain against the shipowner for non delivery

In *Hunter* v *Prinsep*, Lord Ellenborough states the principles relating to the payment of freight as follows (*h*) "The shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas or other unavoidable casualties, and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight, but it was only in that event, viz, of their delivery at the place of destination, that he, the freighter, engages to pay anything If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination, but he has no right to any freight if they are not so forwarded, unless the forwarding them be dispensed with, or unless

(*f*) *Hunter* v *Prinsep* (1808), 10 East 378
(*g*) (1808), 10 East 378 (*h*) (1808), 10 East at p 394

there be some new bargain upon this subject If the shipowner will not forward them, the freighter is entitled to them without paying anything"

Unless prevented by freighter

But where the shipowner is prevented by the act or default of the cargo owner from carrying the goods to their destination, full freight is payable In *The Cargo ex Galam* (*i*), the ship was driven ashore at Scilly and the cargo had to be landed and stored there The charterer wished to alter the port of destination and named Hamburg But the holders of a respondentia bond on the cargo, payable at Falmouth, obtained an order from the Court for the removal of the cargo to London and its sale there It was held that as the shipowner had not abandoned his intention of completing the voyage but had been prevented from doing so by the cargo owner, he was entitled to the freight

In *Christy* v *Row* (*j*), coal was shipped for Hamburg Owing to the presence of a French army, it was dangerous to get to Hamburg and the cargo owner asked for delivery at an intermediate port Part of the cargo was delivered there, but the vessel was then ordered to leave the port The cargo owner refused to pay freight *Held*, there was an agreement to accept delivery at the intermediate port as a substituted performance of the contract, and full freight was payable on the goods delivered there

Pro rata freight

Where the facts warrant an inference that delivery at an intermediate port is to be accepted as part performance of the contract, the law implies a promise to pay *pro rata* freight in proportion to the part of the voyage completed (*k*) To raise such an implied promise to pay *pro rata* freight the merchant must have the option of

(*i*) (1863), 33 L J Adm 97 (*j*) (1808), 1 Taun 300
(*k*) *Hall* v *Wilson* (1879), 41 L T 412

having his goods conveyed to the port of destination He must exercise a real choice Thus a promise to pay *pro rata* freight will not be implied merely from acceptance of the goods at an intermediate port where the master insisted on leaving them (*l*), or from acceptance of the proceeds of sale where the master has exercised his discretion to sell the cargo in the interests of the cargo owner (*m*)

It follows that *pro rata* freight is payable only if the ship owner was able and willing to carry the cargo to its destination In *Vlierboom* v *Chapman* (*n*), rice was to be delivered at Rotterdam During the voyage, some was jettisoned and the rest had to be sold at Mauritius It was held that, as the shipowner could not have delivered at Rotterdam, no fresh agreement for the payment of *pro rata* freight could be inferred

Lump sum freight

Sometimes the charterer agrees to pay for the use of the ship by a lump sum for the voyage payable on delivery of the cargo To earn lump sum freight, the ship must complete the voyage Where some portion of the cargo is lost on the voyage, the question arises whether any deduction is to be made from the lump sum agreed on In *Harrowing Steamship Co* v *Thomas* (*o*), lump sum freight was payable on delivery of a cargo of props The exception clause included perils of the sea Near the port of discharge, the vessel was driven ashore by bad weather and only about two thirds of the cargo was delivered to the defendants *Held*, the plaintiffs had performed their contract which was to deliver the cargo so far as they were not prevented by perils of the sea, and they were entitled to recover the whole lump sum freight

(*l*) *Metcalfe* v *Britannia Ironworks Co* (1877), 36 L T 451
(*m*) *Hunter* v *Prinsep* (*supra*)
(*n*) (1844), 13 L J Ex 384 (*o*) (1913), 82 L J K B 636

It is doubtful whether the shipper can deduct from lump sum freight where some of the goods are lost through causes other than excepted perils

Where it is agreed that freight shall be paid in advance, *e g*, on shipment of the goods or at a definite time thereafter, payment does not depend on delivery and must be made even though the ship is lost and the cargo never delivered (*p*) If after advance freight has been paid the voyage is abandoned, no part of the freight can be recovered (*q*) Advance freight

Where freight is made payable upon final sailing, the ship must have left the port of departure, otherwise freight is not payable Thus in *Roelandts* v *Harrison* (*r*) the ship was being towed out to sea when she ran aground in a ship canal leading from the dock to the sea *Held*, freight payable on final sailing was not due The ship must have got clear of the port and be at sea, ready to proceed on the voyage

As freight is usually payable on delivery of the goods, the burden of making out a case for advance freight is on the shipowner Where freight was payable in London and the voyage was from London to Lisbon, it was held that the stipulation referred to the place and not to the time of payment As the vessel was lost on the voyage, no freight became due (*s*)

Sometimes there is a proviso that freight is to be paid "ship lost or not lost" This is generally taken to indicate an intention to make freight payable in advance In *Weir* v *Gwyn* (*t*) two thirds of the freight was to be paid three days after sailing, ship lost or not lost During the Ship lost or not lost

(*p*) *De Silvale* v *Kendall* (1815), 4 M & S 37

(*q*) *Civil Service Co operative Society* v *General Steam Navigation Co* (1903), 72 L J K B 933 (*r*) (1854), 23 L J Ex 169

(*s*) *Mashiter* v *Buller* (1807) 1 Camp 84

(*t*) (1900), 69 L J Q B 168

loading, some of the cargo already put on board was destroyed by fire It was held that no freight was payable on the goods destroyed as they were lost before advance freight became due

In *Oriental Steamship Co* v *Tylor* (*u*) one third of the freight was made payable on signing bills of lading The ship and cargo were lost before bills of lading had been signed, and the charterers refused to present them for signature *Held*, the charterers must pay one third of the freight as damages for breach of contract

Advances to meet current expenses

But advance freight must be distinguished from advances of cash which are often agreed to be made by a charterer to meet the current expenses of the ship and which are usually deducted from the freight if it becomes payable The latter are simply a loan to the shipowner, and can be recovered in any case, whereas advance freight can never be recovered The fact that the charterer has insured the advance is almost conclusive that it was a payment on account of freight (*v*)

In *Thompson* v *Gillespie* (*w*) a charter party provided for the payment in advance of one fourth of the freight, less 5 per cent for insurance As the ship was not seaworthy when she sailed, the charterer could not claim the benefit of the insurance policy The ship was lost, and it was held that advance freight was not payable because the terms of the contract made it conditional upon the ship being in such a condition, that a policy of insurance on the advance freight would be valid

Full freight is payable

When full freight is payable

(1) When the shipowner delivers or is ready to deliver at

(*u*) (1893), 63 L J Q B 128

(*v*) *Allison* v *Bristol Marine Insurance Co* (1876), 1 A C at p 229

(*w*) (1855), 24 L J Q B 340

the port of destination, substantially the same goods as were shipped

(2) When transhipment having been necessary he has forwarded the goods to the port of delivery

(3) When failure to deliver at the port of destination was due solely to the fault of the freighter, *e g*, refusal to name a port or requiring delivery at an intermediate port If delivery at an intermediate port is taken as performance of the contract, full freight is payable But the circumstances may be such as to show that *pro rata* freight only is to be paid

(4) When lump sum freight having been agreed on, he has delivered or is ready to deliver such part of the cargo as has not been lost by reason of excepted perils (*x*)

(5) When it has been agreed that the whole freight shall be paid in advance (*e g*, on shipment of the cargo), it must be paid, whether the goods are delivered or not, provided the stipulated event (*e g* ,shipment) has taken place

Excepted perils and freight

Speaking generally, excepted perils do not affect the right to freight Where freight is payable on delivery of the goods, the excepted perils do not affect it If the goods are delivered, freight is payable , if they are lost, even though the cause of the loss is an excepted peril, freight is not payable Where freight is payable in advance, *e g* , on shipment, provided the goods are put on board, freight is payable whether or not they are afterwards lost by excepted perils or otherwise In the case of lump sum freight, it is clear that, if part of the cargo is lost through excepted perils, no deduction from the lump sum can be made It is doubtful whether such deduction can be made where the loss arises otherwise

By whom payable —The liability to pay freight reserved

(*x*) *Harrowing Steamship Co* v. *Thomas* (1913), 82 L J K B 636

Bill of lading

in a bill of lading, is primarily upon the shipper of the goods, unless he was merely acting as agent and made this clear at the time But the bill of lading usually contains a clause making delivery conditional upon the consignee or his assigns paying freight, and the master of the ship is entitled to refuse delivery unless the freight is paid The mere taking delivery of goods does not impose a legal liability to pay the freight on them (*y*), but is evidence of an implied promise to do so (*z*)

The Bills of Lading Act, 1855, section 1, imposes on all consignees or endorsees of a bill of lading, to whom the property in the goods passes, the liability to pay freight Section 2 of the Act expressly preserves the shipowner's right to claim freight from the original shipper so that the shipowner can elect to sue the holder of the bill of lading or the shipper

By shipping goods, the shipper impliedly agrees to pay the freight on them He can be relieved of this obligation

(1) By express agreement in the bill of lading

(2) By the shipowner giving credit to the consignee Thus if the master for his own convenience takes a bill of exchange from a consignee who was willing to pay cash, the shipper is discharged (*a*)

Charter party

In the case of a charter party, the charterer is primarily liable for freight, and the fact that he has sublet the services of the ship to persons who have put goods on board under bills of lading reserving the same freight, does not release him Even if the shipowner delivers goods to such shippers without insisting on payment of freight, he can still recover it from the charterer (*b*)

(*y*) *Sanders* v *Vanzeller* (1843), 12 L J Ex 497
(*z*) *Cock* v *Taylor* (1811), 13 East 399
(*a*) *Strong* v *Hart* (1825), 2 C & P 55
(*b*) *Shepard* v *De Bernales* (1811), 13 East 565

Cesser clause

But where the charterer is merely an agent or broker to fill the ship with the goods of other persons, his liability is made to cease when the goods are shipped This is effected by means of a cesser clause inserted in the charter party and giving the shipowner a lien on the cargo for freight and other claims under the charter Such a clause is usually in the following form

"Charterer's liability to cease when the ship is loaded, the captain having a lien on the cargo for freight, dead freight, and demurrage"

Construction of cesser clause

The difficulty in construing cesser clauses has arisen mainly on the question whether the charterer is to be relieved of liabilities accrued before completion of the loading, or whether the exemption applies only to liabilities arising after the goods have been shipped Where it appears from the rest of the contract that another remedy is given for the liabilities already incurred by the charterer, he is held to be released from them (c) The tendency thus, is to hold that the exemption granted to the charterer is co extensive with the lien given to the shipowner Where no lien has been given in respect of a particular claim, the Courts will not enforce the exemption unless there is a clear intention to free the charterer from liability in respect of that claim

In *Gray* v *Carr* (d) the charter party provided that the charterer's liability was to cease on shipment of the cargo and gave a lien for demurrage The bill of lading provided for freight and all other conditions or demurrage as per charter The ship was detained at the port of loading beyond the ten days allowed on demurrage by the charter It was held that the shipowner had a lien as against con

(c) *Francesco* v *Massey* (1873), L R 8 Ex 101
(d) (1871), L R 6 Q B 522

signees under the bill of lading for the ten days demurrage, but not for the detention beyond that time

To whom payable—Ordinarily freight is payable to the person who owned the ship at the time the contract of carriage was made In a bill of lading, freight is generally payable on delivery and then it is usually paid to the master as representing the owner If the contract was made with him, the master himself can bring an action to recover the freight Where the bill of lading makes the freight payable on delivery, the master is liable to the owner if he parts with the goods without such payment Consequently it has been held that he may sue the consignee upon an implied promise to pay the freight in consideration of his parting with the goods before payment (*e*)

Where the ship is sold while on a voyage, the right to the freight which she is earning passes to the purchaser (*f*) A mortgagee does not acquire a right to the freight unless he has taken possession of the ship The right to freight is a chose in action and can be assigned If the provisions of the Judicature Act are complied with, the assignee can sue in his own name

Lien for freight

The common law lien for freight is a possessory lien It can be enforced only by retaining the goods Moreover it arises only when freight is payable on delivery If freight is payable in advance (*g*), or after delivery (*h*), there is at common law no lien to enforce payment The lien can be exercised against all goods consigned to the same person on the same voyage even under different

(*e*) *See* the judgment of Lord Mansfield in *Brouncker* v *Scott* (1811), 4 Taun. at p 4

(*f*) *Lindsay* v *Gibbs* (1856), 22 Beav 522

(*g*) *Tamvaco* v *Simpson* (1866), 35 L J C P 196

(*h*) *Foster* v *Colby* (1858), 28 L J Ex 81

bills of lading, provided they were shipped under one contract (*i*)

The common law lien for freight is not displaced unless the terms of the contract are inconsistent with it (*j*) Where freight is made payable on delivery, there will be a lien for it whether given by the contract or not But where freight is made payable otherwise than on delivery, there will be no lien unless it is expressly given In *Tennaco* v *Simpson* (*k*) half the freight was made payable by a bill of exchange at three months from signing the bills of lading, and the bill of exchange had not become due when the ship reached the port of discharge It was held that there was no lien for this part of the freight, although the freighter had become insolvent

Extent of the lien

Difficulty sometimes arises as to whether the lien covers freight reserved by the charter party or only that stipulated for in the bill of lading Where the consignee is also the charterer, the lien can be exercised for the full charter party freight (*l*), unless the contract in the bill of lading shows a contrary intention As regards persons who are not parties to the charter the presumption is the other way The lien will be enforceable against them only for the freight reserved by the bill of lading unless there is a clear indication in the bill of lading that they are to be liable for charter party freight (*m*)

In *Gardner* v *Trechmann* (*n*) the charter reserved freight at 31*s* 3*d* per ton It contained a clause giving an absolute lien on the cargo for freight The captain was given power

(*i*) *Bernal* v *Pim* (1835) 1 Gale 17
(*j*) *Chase* v *Westmore* (1816) 5 M & S 180
(*k*) (1866), 35 L J C P 196
(*l*) *McClean* v *Fleming* (1871) 25 L T 317
(*m*) *Pearson* v *Goschen* (1864), 33 L J C P 265
(*n*) (1885), 15 Q B D 154

to sign bills of lading at any rate of freight, and provision was made for him to demand payment in advance of the difference between charter party and bill of lading freight Bills of lading were signed reserving freight at 22*s* 6*d* per ton and containing a clause "other conditions as per charter" *Held*, the lien for charter party freight was not preserved as against a consignee (other than the charterer) under the bill of lading As to the clause "other conditions as per charter," Brett, M R , said, "It brings in only those clauses of the charter party which are applicable to the contract contained in the bill of lading, and those clauses of the charter party cannot be brought in which would alter the express stipulations in the bill of lading" It would, however, bring in clauses rendering the holder of the bill of lading liable for demurrage due under the charter party (*o*)

Power of sale

At common law the lien for freight could be enforced only by retaining the goods The shipowner had no power to sell them in order to pay the freight By the Merchant Shipping Act, 1894, section 497, a power to sell the goods is conferred after they have been warehoused for ninety days and the freight and charges on them have not been tendered In the case of perishable goods, the power of sale may be exercised earlier See Appendix D

(*o*) *Porteus* v *Watney* (1878), 47 L J Q B 643

APPENDIX A

FORM OF BILL OF LADING

A BILL of lading is generally in somewhat the following form

Shipped in good order and condition by X in and upon the good ship *Jane* now lying in the Port of Smyrna and bound for London with liberty to call at any ports on the way for coaling or other necessary purposes, six hundred cases of raisins being marked and numbered as per margin (weight measure and contents unknown), and to be delivered in like good order and condition at the Port of London, the Act of God the King's enemies perils of the sea fire barratry of the master and crew, collisions and other accidents of navigation excepted, unto Y or to his or their assigns, he or they paying freight on the said goods on delivery at the rate of 20*s* per case and charges as per margin

APPENDIX B

FORM OF CHARTER PARTY

It is this day mutually agreed between the Utopia Steamship Co Ltd, owners of the good steamship called the *Jane Elizabeth* of three thousand tons net register or thereabouts, now lying in the Port of London and John Jones of Manchester merchant That the said ship, being tight, staunch, and strong, and in every way fitted for the voyage shall with all reasonable dispatch proceed to Alexandria and there load a full and complete cargo of cotton $\frac{\text{and}}{\text{or}}$ other lawful merchandize and being so loaded shall proceed to Liverpool or so near thereto as she may safely get and deliver the same on being paid freight at the rate of 20*s* per bale of 100 lb, with liberty to call at any port or ports on the way (the Act of God, the King's enemies restraints of princes fire, and all and every other perils and accidents of the sea always mutually excepted)

Ten days to be allowed for loading and discharge and five days on demurrage over and above the said lay days at £10 per working day

NOTE.—The above forms are based upon bills of lading and charter parties actually in use, but they have been simplified so as to exclude provisions which are not discussed in the text

APPENDIX C

THE BILLS OF LADING ACT, 1855, 18 AND 19 VICT C 111

WHEREAS, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid

(1) Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself

(2) Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement

(3) Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims

APPENDIX D

THE MERCHANT SHIPPING ACT, 1894 (57 & 58 Vict c 60)

PART V SAFETY

Dangerous Goods

446.—(1) A person shall not send or attempt to send by any vessel, British or foreign, and a person not being the master or owner of the vessel shall not carry or attempt to carry in any such vessel, any dangerous goods, without distinctly marking their nature on the outside of the package containing the same, and giving written notice of the nature of those goods and of the name and address of the sender or carrier thereof to the master or owner of the vessel at or before the time of sending the same to be shipped or taking the same on board the vessel

(2) If any person fails without reasonable cause to comply with this section, he shall for each offence be liable to a fine not exceeding one hundred pounds, or if he shows that he was merely an agent in the shipment of any such goods as aforesaid, and was not aware and did not suspect and had no reason to suspect that the goods shipped by him were of a dangerous nature, then not exceeding ten pounds

(3) For the purpose of this part of this Act the expression "dangerous goods" means aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro glycerine, petroleum, any explosives within the meaning of the Explosives Act, 1875, and any other goods which are of a dangerous nature

PART VII DELIVERY OF GOODS

493.—(1) Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or, having made entry thereof, to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the goods at the following times

(*a*) If a time for the delivery of the goods is expressed in the charter party, bill of lading, or agreement, then at any time after the time so expressed,

(*b*) If no time for the delivery of the goods is expressed in the charter party, bill of lading, or agreement, then at any time after the expiration of seventy two hours, exclusive of a Sunday or holiday from the time of the report of the ship

494.—If at the time when any goods are landed from any ship and placed in the custody of any person as a wharfinger or ware houseman, the shipowner gives to the wharfinger or warehouseman notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to in amount mentioned in the notice the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien, if any, for such charges as they were subject to before the landing thereof, and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as here inafter mentioned and shall if he fails so to do make good to the shipowner any loss thereby occasioned to him

495.—The said lien for freight and other charges shall be dis charged—

(1) Upon the production to the wharfinger or warehouseman of a receipt for the amount claimed as due and delivery to the wharfinger or warehouseman of a copy thereof or of a release of freight from the shipowner, and

(2) Upon the deposit by the owner of the goods with the wharfinger or warehouseman of a sum of money equal in amount to the sum claimed as aforesaid by the shipowner,

but in the latter case the lien shall be discharged without prejudice to any other remedy which the shipowner may have for the recovery of the freight

497.—(1) If the lien is not discharged, and no deposit is made as aforesaid the wharfinger or warehouseman may and, if required by the shipowner shall, at the expiration of ninety days from the time when the goods were placed in his custody or, if the goods are of a perishable nature at such earlier period as in his discretion he thinks fit, sell by public auction, either for home use or for exportation, the goods or so much thereof as may be necessary to satisfy the charges hereinafter mentioned

(2) Before making the sale the wharfinger or warehouseman shall give notice thereof by advertisement in two local newspapers circulating in the neighbourhood or in one daily newspaper pub lished in London and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharfinger or warehouseman, or is otherwise known to him, send notice of the sale to the owner of the goods by post

(3) The title of a *bonâ fide* purchaser of the goods shall not be invalidated by reason of the omission to send the notice required

by this section, nor shall any such purchaser be bound to inquire whether the notice has been sent

PART VIII LIABILITY OF SHIPOWNERS

502 —The owner of a British sea going ship or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely

(i) Where any goods merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship , or

(ii) Where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof

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SUPPLEMENT TO

PAYNE'S

CARRIAGE OF GOODS BY SEA

Including the relevant cases down to July, 1919

TABLE OF CASES REFERRED TO IN SUPPLEMENT

FRUSTRATION OF THE ADVENTURE BY DELAY

(See *Jackson* v *Union Marine Insurance Co*, p 54)

The War has added a long list of cases in which one of the parties has claimed to be discharged from his obligations under a contract on the ground of delay which frustrates the object in view when the contract was made It is not easy to extract from the cases a uniform principle, but it seems clear that the Courts will not hold either party discharged unless the delay is such as to

(1) destroy the whole basis upon which the contract rests, or

(2) cover substantially the whole period contemplated by the contract or remaining at the date of the interruption

A party is entitled to claim that frustration has occurred when an interruption occurs which in the opinion of a reasonable business man will be such as to comply with condition (1) or (2) above

Definition "The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable, is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and

for the accomplishment of which object or objects the contract was made" (*a*)

In *Admiral Shipping Co* v *Weidner Hopkins* (*b*) a ship hired for two Baltic rounds was not allowed to leave a Russian port on account of the outbreak of war between Germany and Russia The charter contained an exception of "restraints of princes" *Held*, that the delay was such as completely to frustrate the adventure and the charterers were not liable for hire The same conclusion on practically the same facts was reached in *Scottish Navigation Co* v *Souter*, reported under the same reference It is not quite clear whether these cases were regarded as time or as voyage charters The hire was payable periodically as in a time charter, but the service was to be for one or two Baltic rounds

The next two cases were time charters interrupted by Admiralty requisition In *Tamplin* v *Anglo-Mexican Co* (*c*) the charter was for five years from December, 1912 It contained an exception of "restraints of princes," and gave the charterers power to sub-let on Admiralty or other service It was held by a majority of the House of Lords that the interruption was not such as to excuse from further performance of the contract Lord Loreburn put the decision on the ground that where a delay for which neither party is responsible is so great as to make it unreasonable to require the parties to go on with the adventure, either may treat it as at an end, but that such delay had not occurred in this case because the requisition might last only a few months

On the other hand, in *Anglo-Northern Trading Co* v *Emlyn Jones* (*d*), where the charter was for one year and was inter-

(*a*) Per Bailhache, J, in *Admiral Shipping Co* v *Weidner Hopkins*, [1916] 1 K B at pp 436, 437
(*b*) [1917] 1 K. B 222
(*c*) [1916] 2 A C 397
(*d*) [1917] 2 K B 78

to pass through the Dardanelles, in spite of the fact that the Turkish Government had allowed Greek vessels to pass for two short periods subsequent to the refusal to load The ground of the decision was that the shipowners were prevented from carrying out their contract by an excepted peril—"restraint of princes"—and as this was likely to last so long as to frustrate the adventure, the charterers were relieved from their obligation to load

Some doubt is however, thrown on this view by *Andrew Millar* v *Taylor & Co* (*i*), in which the contract made in July, 1914, was for the sale of confectionery for export On August 5th export of confectionery was prohibited, and the sellers claimed to be discharged from their further obligations under the contract On August 20th the prohibition was withdrawn The Court of Appeal held that the sellers ought to have waited a reasonable time before repudiating the contract The burden of proving that at any particular time a sufficiently serious interruption has occurred to put an end to the contract is on the party who asserts it (*j*)

Andrew Millar v *Taylor & Co* (*supra*) suggests the view that where the duration of the interruption is uncertain and turns out in the event to be such as would not frustrate the contract, a party who has immediately on its occurrence treated it as though it would, must take the risk of his wrong estimate This would also seem to be the effect of *Ropner* v *Ronnebeck* (*k*), in which, owing to a strike of engineers, the charterer refused to load until the shipowner had ensured sailing by securing a full complement of engineers *Held*, he was nevertheless liable for demurrage as the strike of engineers did not affect the

(*i*) [1916] 1 K B 402

(*j*) *Metropolitan Water Board* v *Dick Kerr & Co*, [1917] 2 K B 1, per Scrutton, L J, at p 31

(*k*) [1914] 20 Com Ca 95

loading but only the subsequent sailing of the ship If in this case the strike of engineers had gone on for several months, it is difficult to see why the charterer should not repudiate the contract The leading case of *Jackson* v *Union Marine Insurance Co* (*l*) makes it quite clear that a charterer is entitled to repudiate if the ship cannot sail within a reasonable time In that case the vessel was stranded on January 2nd whilst proceeding to the port of loading and could not be repaired for some months The charterers were held justified in repudiating the charter on February 15th, on the ground that the ship could not be repaired within a reasonable time having regard to the object of the charter-party

The difficulty in these cases seems to be that when the case comes before the Courts the uncertainty as to the duration of the interruption has often resolved itself, and the Courts seem to oscillate between holding a party not liable if he has acted on the reasonable forecast of a business man and holding him liable if his forecast has proved to be wrong It is submitted that the former is the correct view, and that *Andrew Millar* v *Taylor and Co* and *Ropner* v *Ronnebeck* must be taken merely as deciding that a reasonable business man would not have acted as the seller and charterer respectively did act in those cases

EXCEPTED PERILS AND OVERCARRYING

(See *Searle* v *Lund*, p 23)

Sometimes the contract expressly gives the carrier the right to carry the goods beyond their destination, provided he transships and sends them back In such cases he will be entitled to the protection of the excepted perils, even during the part of

(*l*) (1874) 44 L J C P 127

the voyage after transhipment Thus, in *Broken Hill Proprietary Co* v *P & O* (*m*), lead was shipped at Sydney for Colombo under a bill of lading excepting perils of the sea, and giving permission to carry the goods beyond their port of destination and reship and forward them At Colombo, owing to labour trouble, the lead could not be discharged without unduly delaying the ship, which was carrying mails The lead was therefore taken on to Bombay, and reshipped for Colombo On the way to Colombo the vessel stranded *Held*, the lead was lost by excepted perils in the course of the voyage, and the carrier was not liable

STATUTORY EXCEPTION OF FIRE

Under the Merchant Shipping Act, 1894, section 502

(See pp 30–32)

Considerable new light has been thrown on this subject by the Court of Appeal Fault or privity of the shipowner includes culpable acts of omission on the part of a managing owner (*n*)

In *Ingram* v *Services Maritimes du Treport* (*o*), where the bill of lading contained an exception of fire, and stipulated that the exercise of reasonable diligence in connexion with the upkeep of the ship should absolve the shipowner from every duty, warranty, or obligation, it was held that the statutory exception was not excluded This case was distinguished from *Virginia, etc , Co* v *Norfolk S S Co* (*p*), where the statute was

(*m*) [1917] 1 K B 688, 22 Com Ca 178

(*n*) *Asiatic Petrol Co* v *Lennards* (1913), 29 T L R 739, 18 Com Ca 328

(*o*) (1918) 19 Com Ca 105, reversing Scrutton, J , 18 Com Ca 109, 29 T L R 274

(*p*) (1913) 28 T L R 85, 17 Com Ca 6

held to be excluded, on the ground that in that case the parties had expressly dealt with and displaced the whole of the implied warranty of seaworthiness, and thus negatived an intention to rely on the statute for relief from that implied undertaking In the latter case the parties had only dealt with the part of the warranty relating to the upkeep of the ship The following statement of the law by Buckley, L J (*q*), was approved "Apart from statute, a shipowner was at common law under two liabilities, the one that of an insurer, and the other an implied warranty of seaworthiness The statute in the case of fire relieves him from both the first and the second of these liabilities if the fire happened without his actual fault or privity" The section is to be read as though it said any British sea going ship, be it seaworthy or unseaworthy

DEVIATION

Can the shipowner claim benefit of the common law exceptions? (See pp 57 and 58)

In *Morrison and Co* v *Shaw Savill and Albion Co* (*r*), wool was shipped under a bill of lading on the margin of which were the words, "Direct service between New Zealand and London" Liberty was given to call at any intermediate port after leaving New Zealand The ship deviated towards Havre and was torpedoed and sunk *Held*, Havre was not an intermediate port, and the shipowner was not protected by the common law exception, king's enemies *Davis* v *Garrett* (*s*) was approved That case lays down the doctrine that where a loss occurs while the wrongful act (deviation) is in progress,

(*q*) 17 Com Ca, at p 18
(*r*) [1916] 2 K B 783, 22 Com Ca 81
(*s*) (1830) 6 Bing 716, approved in *Lilley* v *Doubleday* (1881), 7 Q B D 510

and is attributable to such act, the carrier cannot set up as a defence the mere possibility that the loss would have occurred even if his wrongful act had never been done He was held liable in this case, because he could not show that the ship would have been torpedoed even if she had not deviated

The statement in the text with regard to the *International Guano Co* v *McAndrew* (*t*) requires modification In that case, the exception relied on was inherent vice A common carrier is not liable for damage due to inherent vice, but he is under an implied undertaking to perform the voyage with reasonable dispatch If there is an inherent defect in the cargo at the commencement of the voyage, the carrier will not be responsible up to the time he deviates, but after that he will be liable for any damage arising from delay Clearly, under the doctrine of *Davis* v *Garrett*, he can show that damage arising from inherent vice during the normal course of the voyage must have arisen even if he had not deviated

GENERAL AVERAGE—DAMAGE TO THIRD PARTIES

(See p 76)

In *Austin Friars* v *Spillers and Bakers* (*u*) the question arose whether damage to the property of persons not concerned in the adventure could be the subject of general average In that case the ship had been stranded and was leaking badly The master and pilot knew that in taking the ship into a dock they were liable to cause damage Nevertheless, their action was held to be reasonable and prudent in the interests of ship and cargo, and the damage done to the dock was held to be the subject of general average This case also laid it down that

(*t*) [1909] 2 K B 360, 25 T L R 529
(*u*) [1915] 3 K B 586 20 Com Ca 100, 342

the common law rule against contribution between joint tort feasors does not apply to general average

SAFE PORT—POLITICALLY AND PHYSICALLY SAFE

(See p 81)

The question is one of fact in each case In *Palace Shipping Co* v *Gans* (*a*) the effect of a proclamation by the German Government that hostile merchant ships in British waters would be destroyed was considered It was held that the proportion of ships sunk to arrivals was so small as not to render Newcastle upon-Tyne an unsafe port, and the shipowner could not refuse to send his ship there

DEMURRAGE—EXCEPTION OF STRIKES

(See pp 88, 89)

In *Dampskibsselskabet Svendborg* v *Love* (*z*) a charter party provided that if the cargo could not be discharged by reason of a strike of any class of workmen, time for discharge was not to count during the strike When the vessel arrived there was a strike of workmen in the charterer's yard It was customary at the port to discharge direct into railway waggons, but the railway company refused to supply them, for fear they would be delayed in the charterer's yard *Held*, the charterer had failed to discharge with customary dispatch, as the delay was not due to circumstances affecting the discharge but the subsequent disposal of the cargo

(*a*) (1915) 21 Com Ca 270
(*z*) (1915) S C 543

LAY DAYS—WHAT CONSTITUTES AN "ARRIVED" SHIP?

(See p 88)

In order to compute demurrage, it is necessary to know when the ship is legally considered to have arrived at the port of loading or discharge The leading case is *Leonis S S Co* v *Rank* (*a*), where a ship, chartered to load at a named port, was detained because she could not get a berth at the particular spot where the charterer wished her to load "Where the charter is to discharge in a named place which is a larger area in some part, or in several parts, of which the ship can discharge, the lay days commence so soon as the shipowner has placed the vessel at the disposal of the charterer in that named place as a ship ready, so far as she is concerned, to discharge, notwithstanding that the charterer has not named, or has been unable, owing to the crowded state of the port, to name, a berth at which in fact the discharge can take place" (*b*) But where the contract expressly reserves to the charterer the right to name a particular dock or berth, the lay days do not begin until the ship has arrived at that dock or berth (*c*)

INCORPORATION OF CHARTER IN BILL OF LADING

(See p 90)

In *Hogarth S Co* v *Blythe* (*d*) the bill of lading contained the usual incorporation clause, and the charter stipulated that the bill of lading should be conclusive proof of cargo shipped

(*a*) [1908] 1 K B 499, followed in *Armement Adolf Deppe* v *Robinson*, [1917] 2 K B 204

(*b*) Per Buckley, L J , [1908] 1 K B at p 512

(*c*) *Tharsis, &c , Co* v *Morel*, [1891] 2 Q B D 647

(*d*) [1917] 2 K B 534, 22 Com Ca 334

On delivery the goods were found to be short of the amount stated in the bill of lading The consignee claimed that the shipowner was bound by the stipulation in the charter that the bill of lading was conclusive as to goods shipped *Held*, the only conditions in the charter which were incorporated in the bill of lading were those to be performed by the consignee, and moreover the conclusive evidence clause could not be incorporated, as it was inconsistent with the bill of lading clause, "weight, contents and value unknown"

FREIGHT—*PRO RATA* FREIGHT

(See pp 95 and 96)

In the *St Enoch Shipping Co* v *Phosphate Mining Co* (*e*) phosphate was shipped on a British ship from Florida to Hamburg The ship arrived in British waters on August 3rd, 1914, and, in accordance with advice from the British Admiralty, she put into an English port War broke out on August 4th The cargo was discharged at Runcorn, and deposited by the shipowner in a warehouse, subject to a lien for freight The cargo owner paid the freight under protest, and then sued to recover it *Held*, the shipowner was not entitled to full freight, as he had not delivered at Hamburg, nor to *pro rata* freight, as the cargo owner had not agreed to accept delivery at Runcorn, in lieu of delivery at Hamburg

ADVANCE FREIGHT

(See pp 97 and 98)

In *Coker & Co* v *Limerick Steamship Co* (*f*) a cargo was carried from Liverpool to Archangel at a certain freight per

(*e*) [1916] 2 K B 624 21 Com Ca 192
(*f*) [1918] 34 T L R 296, 87 L J K B 767

ton delivered The chartered freight, less 3 per cent, was payable in Liverpool before sailing on signing bills of lading If bill of lading freights fell short of chartered freight, the difference was to be paid on clearing Before the loading of the vessel was finished, and therefore before the bills of lading had all been signed, the vessel took fire and sank *Held*, the chartered freight was advance freight, and a proportionate part of it became due as and when each bill of lading was signed